

ENTERED

FEB 9 1961

F 2302

San Francisco Law Library

436 CITY HALL


No. 168190

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov



No. 16418

VOL 3110

United States
Court of Appeals
for the Ninth Circuit

REX L. NEELY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 240, Incl.)

Appeal from the United States District Court
for the District of Arizona

FILED

JUL 17 1959

PAUL P. O'BRIEN, CLERK



No. 16418

United States
Court of Appeals
for the Ninth Circuit

REX L. NEELY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 240, Incl.)

Appeal from the United States District Court
for the District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Bond Pending	25
Certificate of Clerk to Transcript of Record on	28
Notice of	26
Order Extending Time to File Record on ..	27
Order Fixing Bail Pending	24
Statement of Points on (USCA)	509
Stipulation That Exhibits May Be Considered in Original Form on (USCA)	510

Bond Pending Appeal	25
Certificate of Clerk to Transcript of Record ..	28
Indictment	3
Judgment	23

Minute Entries:

10-28-57—Arraignment	15
11-27-57—Order Denying Rex L. Neely's Mo- tion to Dismiss Indictment	17
12- 9-57—Plea of Not Guilty	17
9-12-58—Motion for Judgment of Acquittal and Order Denying Same	18

Minute Entries—(Continued):

9-18-58—Motion for Judgment of Acquittal and Order Denying Same	18
10-27-58—Argument on Motion for New Trial and Motion in Arrest of Judgment	22
10-29-58—Order Denying Motion for New Trial and Motion in Arrest of Judgment ..	22
Motion for Additional Time to File Certain Motions and Order Thereon	19
Motion for New Trial	21
Motion in Arrest of Judgment	20
Motion to Dismiss	16
Names and Addresses of Attorneys	1
Notice of Appeal of Rex L. Neely	26
Order Denying Rex L. Neely's Motion to Dis- miss Indictment	17
Order Extending Time to File Record on Ap- peal	27
Order Fixing Bail Pending Appeal	24
Statement of Points on Which Appellant Neely Intends to Rely (USCA)	509
Stipulation that Exhibits May Be Considered in Original Form (USCA)	510
Transcript of Proceedings and Testimony	30
Exceptions to Instructions	506

Transcript of Proceedings—(Continued):

Instructions to the Jury	483
Motions for Judgment of Acquittal	261, 482

Witnesses for Defendant:

Ashburn, Ralph	
—direct (Stanfield)	363
—cross (Hays)	364

Asher, William I.	
—direct (Whitney)	276
—cross (Hays)	276

Davis, Tom	
—direct (Whitney)	360

Hoopes, John	
—direct (Whitney)	275

Lewis, Burt	
—direct (Whitney)	274

Neely, Rex L.	
—direct (Whitney)	265, 277, 321
—cross (Holohan)	323
—redirect (Whitney)	358

Patterson, J. E.	
—surrebuttal direct (Whitney)	479

Short, Joe L.	
—direct (Stanfield)	365, 391, 419
—cross (Whitney)	425, 456
—cross (Hays)	444
—redirect (Stanfield)	458

Transcript of Proceedings—(Continued):

Witnesses for Defendant—(Continued):

Stapley, L. E.

—direct (Whitney) 322

Watson, George

—direct (Stanfield) 390

Witnesses for the Government:

Bates, Ray W.

—rebuttal, direct (Holohan) 462

—cross (Whitney) 469

Davis, Tom C.

—direct (Holohan) 32

—cross (Whitney) 41, 45

—cross (Stanfield) 52

Dunkin, Doyle L.

—direct (Hays) 258

—cross (Whitney) 260

Johnson, Lloyd N.

—direct (Holohan) 215, 241

—cross (Whitney) 246

—redirect (Holohan) 256

—recross (Whitney) 257

Kennedy, Doyle S.

—direct (Hays) 126

—cross (Whitney) 157, 166

—cross (Stanfield) 181, 192

—recross (Whitney) 209, 213

—redirect (Hays) 211

Transcript of Proceedings—(Continued):

Witnesses for the Government—(Continued):

Love, Curry

—direct (Hays)	113
—cross (Whitney)	115
—cross (Stanfield)	116
—redirect (Hays)	118
—recross (Whitney)	118, 120
—recross (Stanfield)	119

Mathis, H. L.

—direct (Holohan)	58
—cross (Stanfield)	77
—cross (Whitney)	82
—redirect (Holohan)	92, 101
—recross (Whitney)	100

Outlaw, Elizabeth Treadway

—direct (Hays)	102
----------------------	-----

Parsons, Walter E.

—rebuttal, direct (Holohan)	459
—cross (Whitney)	461

Ruth, Glenn L.

—direct (Hays)	121
----------------------	-----

Wolfe, Ray

—direct (Hays)	106
—cross (Whitney)	110

Woody, Charles, Jr.

—rebuttal, direct (Holohan)	472
-----------------------------------	-----

Verdict	19
---------------	----

NAMES AND ADDRESSES OF ATTORNEYS

WHITNEY AND LaPRADE,
LOUIS B. WHITNEY,

810 Luhrs Tower,
Phoenix, Arizona,

Attorneys for Appellant.

JACK D. H. HAYS,

United States Attorney,

WILLIAM A. HOLOHAN,

Assistant United States Attorney,

204 Federal Building,
Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court
For the District of Arizona

No. C-14746 Phx.

UNITED STATES OF AMERICA, Plaintiff,

vs.

REX L. NEELY and JOE L. SHORT,
Defendants.

INDICTMENT

Violations: 18 U.S.C. 371 (Conspiracy); 18 U.S.C.
1001 (False Statements); 18 U.S.C. 2073 (False
Entries); 18 U.S.C. 201 and 202 (Bribery).

The Grand Jury Charges:

Count I

On or about April 5, 1954, within the District of Arizona, the defendant Rex L. Neely, well knowing Joe L. Short to be an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and in such capacity charged with the duty of proper administration of the cotton acreage allotment and marketing quota program of the United States as the defendant well knew, did wilfully and unlawfully tender to the said Joe L. Short a check in the amount of \$1,620.00, dated April 5, 1954, drawn on the Valley National Bank, Mesa, Arizona, signed by the defendant as drawer, and payable to the

order of Joe Short, with intent to influence the said Joe L. Short, to act in his aforesaid official capacity in committing and allowing the commission of a fraud against the United States, to wit: the procuring of a cotton allotment for the defendant in excess of that to which the defendant was lawfully entitled under the cotton acreage allotment and marketing quota program of the United States.

(18 U.S.C. 201.)

Count II

On or about April 5, 1954, within the District of Arizona, the defendant Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and charged with the duty of administering the cotton acreage allotment and marketing quota program of the United States, did, with intent to have his actions influenced in a matter before him in his official capacity, to wit: the procuring of an additional cotton acreage allotment for Rex L. Neely, wilfully and unlawfully accept from Rex L. Neely a check in the amount of \$1,620.00, dated April 5, 1954, drawn on the Valley National Bank, Mesa, Arizona, signed by the said Neely as drawer, and payable to the order of Joe Short.

(18 U.S.C. 202.)

Count III

On or about November 22, 1954, within the District of Arizona, the defendant Rex L. Neely, well

knowing Joe L. Short to be an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and in such capacity charged with the duty of proper administration of the cotton acreage allotment and marketing quota program of the United States as the defendant well knew, did wilfully and unlawfully tender to the said Joe L. Short a check in the amount of \$1,410.00, dated November 22, 1954, drawn on the Valley National Bank, Mesa, Arizona, signed by the defendant as drawer, and payable to the order of Joe L. Short, with intent to influence the said Joe L. Short, to act in his afore-said official capacity in committing and allowing the commission of a fraud against the United States, to wit: the procuring of a cotton allotment for said Neely in excess of that to which the defendant was lawfully entitled under the cotton acreage allotment and marketing quota program of the United States.

(18 U.S.C. 201.)

Count IV

On or about November 22, 1954, within the District of Arizona, the defendant Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and charged with the duty of administering the cotton acreage allotment and marketing quota program of the United States, did, with intent to have his actions influenced in a matter before him in his official

capacity, to wit: the procuring of an additional cotton acreage allotment for Rex L. Neely, wilfully and unlawfully accept from Rex L. Neely a check in the amount of \$1,410.00, dated November 22, 1954, drawn on the Valley National Bank, Mesa, Arizona, signed by the defendant as drawer, and payable to the order of Joe L. Short.

(18 U.S.C. 202.)

Count V.

On or about December 9, 1955, within the District of Arizona, the defendant Rex L. Neely, well knowing Joe L. Short to be an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and in such capacity charged with the duty of proper administration of the cotton acreage allotment and marketing quota program of the United States as the defendant well knew, did wilfully and unlawfully tender to the said Joe L. Short a check in the amount of \$1,750.00, dated December 9, 1955, drawn on the Valley National Bank, Mesa, Arizona, signed by the defendant as drawer, and payable to the order of Joe Short, with intent to influence the said Joe L. Short, to act in his aforesaid official capacity in committing and allowing the commission of a fraud against the United States, to wit: the procuring of a cotton allotment for the defendant in excess of that to which the defendant was lawfully entitled under the cotton acreage allotment and marketing quota program of the United States.

(18 U.S.C. 201.)

Count VI

On or about December 9, 1955, within the District of Arizona, the defendant Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and charged with the duty of administering the cotton acreage allotment and marketing quota program of the United States, did, with intent to have his actions influenced in a matter before him in his official capacity, to wit: the procuring of an additional cotton acreage allotment for Rex L. Neely, wilfully and unlawfully accept from Rex L. Neely a check in the amount of \$1,750.00, dated December 9, 1955, drawn on the Valley National Bank, Mesa, Arizona, signed by said Neely as drawer, and payable to the order of Joe Short.

(18 U.S.C. 202.)

Count VII

1. On or about the 19th day of March, 1954, Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and being charged with the duty of keeping accounts and records of said agency, did within the District of Arizona, unlawfully, knowingly and feloniously, with intent to deceive, mislead, injure and defraud the United States and persons to the grand jury unknown, make and cause to be made a false and fictitious entry on the official listing sheets of the Pinal County Agricultural Stabilization and

Conservation Committee Office for the 1954 cotton crop year; a record relating to and connected with his duties, by indicating thereon 400.8 acres of cotton allotment acreage apportioned to Farm 647, well knowing said entry to be false.

2. The defendant Rex L. Neely did unlawfully aid, abet and induce the defendant Joe L. Short in the commission of the acts charged in paragraph One of this count.

(18 U.S.C. 2073.)

Count VIII

1. On or about the 19th day of March, 1954, Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and being charged with the duty of keeping accounts and records of said agency, did within the District of Arizona, unlawfully, knowingly and feloniously, with intent to deceive, mislead, injure and defraud the United States and persons to the grand jury unknown, make and cause to be made a false and fictitious entry on the Release and Reapportionment Supplement sheets of the Pinal County Agricultural Stabilization and Conservation Committee office for the 1954 cotton crop year, a record relating to and connected with his duties, by indicating thereon 73.4 acres of cotton allotment acreage released by Farm 595, well knowing said entry to be false.

2. The defendant Rex L. Neely did unlawfully aid, abet and induce the defendant Joe L. Short in

the commission of the acts charged in paragraph One of this count.

(18 U.S.C. 2073.)

Count IX

1. On or about the 19th day of March, 1954, Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and being charged with the duty of keeping accounts and records of said agency, did within the District of Arizona, unlawfully, knowingly and feloniously, with intent to deceive, mislead, injure and defraud the United States and persons to the grand jury unknown, make and cause to be made a false and fictitious entry on a revised Notice of Allotment for Farm 647 of the Pinal County Agricultural Stabilization and Conservation Committee Office for the 1954 cotton crop year, a record relating to and connected with his duties, by indicating thereon 400.8 acres of cotton allotment acreage due to released and reapportioned unused farm allotment, well knowing said entry to be false.

2. The defendant Rex L. Neely did unlawfully aid, abet and induce the defendant Joe L. Short in the commission of the acts charged in paragraph One of this count.

(18 U.S.C. 2073.)

Count X

1. On or about the 18th day of August, 1955, Joe L. Short, being then and there an employee of the

Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and being charged with the duty of keeping accounts and records of said agency, did within the District of Arizona, unlawfully, knowingly and feloniously, with intent to deceive, mislead, injure and defraud the United States and persons to the grand jury unknown, make and cause to be made a false and fictitious entry as to Farm 647, short staple cotton, on Form 578 of the Pinal County Agricultural Stabilization and Conservation Committee Office for the 1955 cotton crop year, a record relating to and connected with his duties, by indicating thereon 120.4 acres of cotton destroyed on said Farm 647, well knowing said entry to be false.

2. The defendant Rex L. Neely did unlawfully aid, abet and induce the defendant Joe L. Short in the commission of the acts charged in paragraph One of this count.

(18 U.S.C. 2073.)

Count XI

1. On or about the 18th day of August, 1955, Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and being charged with the duty of keeping accounts and records of said agency, did within the District of Arizona, unlawfully, knowingly and feloniously, with intent to deceive, mislead, injure and defraud the United States and persons to the grand jury unknown, make and cause to be made a false

and fictitious entry as to Farm 647, long staple cotton, on Form 578 of the Pinal County Agricultural Stabilization and Conservation Committee Office for the 1955 cotton crop year, a record relating to and connected with his duties, by indicating thereon 1.8 acres of cotton destroyed on said Farm 647, well knowing said entry to be false.

2. The defendant Rex L. Neely did unlawfully aid, abet and induce the defendant Joe L. Short in the commission of the acts charged in paragraph One of this count.

(18 U.S.C. 2073.)

Count XII

1. Commencing on or about the 15th day of September, 1953, and continuing thereafter to on or about the 28th day of December, 1956, the defendants, Rex L. Neely, hereinafter referred to as Neely, and Joe L. Short, hereinafter referred to as Short, did within the District of Arizona unlawfully, wilfully and knowingly conspire together to defraud the United States in the exercise of its governmental functions of administering the cotton acreage allotment and marketing quota program and other agricultural programs free from bribery, improper influence, dishonesty, unlawful impairment, fraud and corruption, and in its right and interest in the conscientious, honest and faithful service, judgment, determination and action of the defendant Short, as a duly appointed employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United

States, free from bribery, corruption, improper influence, dishonesty, bias, hope of unlawful reward and fraud.

2. During the existence of the conspiracy and at all times mentioned herein, the defendant Neely was a farmer engaged in the occupation of raising, among other things, crops of cotton.

3. During the existence of the conspiracy and at all times mentioned herein the defendant Short was employed by the Department of Agriculture in the Pinal County Agricultural Stabilization and Conservation Committee Office as office manager.

4. It was a part of the conspiracy that the defendant Short should contrive to secure for the defendant Neely a cotton allotment from the Agricultural Stabilization and Conservation Committee in Pinal County far in excess of the allotment to which Neely was lawfully entitled under the cotton support program, thereby enabling the defendant Neely to market the excess cotton without penalty.

5. It was a further part of the conspiracy that Short should share in the illegal benefits accruing to Neely by receiving payments in money from Neely on a per acre basis.

6. It was a further part of the conspiracy that Short should alter, change, and falsify the records of the Agricultural Stabilization and Conservation Committee Office to provide additional cotton allotment acreage for Neely and to prevent the discovery or disclosure of the illegal activity.

7. It was a further part of the conspiracy that Neely should apply for and Short should process

requests for Agriculture Conservation Program payments from Department of Agriculture to which Neely was not entitled; and that such payments should be substantiated by the presentation of false documents and fraudulent misrepresentations to said department by Short.

Overt Acts

8. For the purpose of carrying out the said conspiracy and to effect the objectives and purposes thereof, the defendants did and committed the following overt acts:

(1) On or about March 19, 1954, Short altered the amount of Neely's 1954 acreage cotton allotment on the official listing sheet of the Pinal County Agricultural Stabilization and Conservation Committee Office by lining out the figures 319.8 and inserting above it the figures 400.8.

(2) On or about March 30, 1954, Short signed the fictitious name, W. R. Burns, to a lease, by which 160 acres of land having the same legal description as Farm 595 was leased to Neely.

(3) On or about April 5, 1954, Neely issued a check payable to Short for \$1,620.

(4) On or about November 22, 1954, Neely issued a check payable to Short for \$1,410.

(5) On or about August 18, 1955, Neely signed his Form 578, an official form of the aforesaid office, which showed 426.5 acres of planted short staple cotton and none destroyed, and at the same time accepted his marketing card and signed it, on which

marketing card was shown that his allotment was 306.1 acres and that his planted acreage was 306.1.

(6) On or about December 9, 1955, Neely issued to Short a check for \$1,750.

(7) On or about October 3, 1956, Neely signed his Form 578, an official form of the aforesaid office for short staple cotton, showing his planted acreage as 477.7 and at the same time accepted his short staple marketing card which showed his planted acreage as 306.7.

(8) On or about December 1, 1956, Short instructed H. L. Mathis to make up a new Notice of Allotment showing that Neely had an acreage allotment of 367.7 acres.

(9) On or about August or September, 1954, Neely requested Agriculture Conservation Program assistance for a ditch lining practice indicating that construction of the ditch would be commenced by Neely in September.

(10) On or about September 27, 1954, Neely made application for payment in the amount of \$1,500.

(18 U.S.C. 371.)

A True Bill.

/s/ ROGER S. HOGEL,
Foreman.

/s/ JACK D. H. HAYS,
United States Attorney.

[Endorsed]: Filed October 23, 1957.

In the United States District Court
For the District of Arizona

October 1957 Term

At Phoenix

Minute Entry of
Monday, October 28, 1957
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

This case is called for arraignment this day. The defendant Rex L. Neely is present in person with his counsel, Louis B. Whitney and Paul LaPrade. The defendant Joe L. Short is present in person with counsel, Preston Sult, Esq., who appears on behalf of Wm. A. Stanfield, Esq., counsel for said defendant. The defendants are arraigned. The defendants waive reading of the Indictment and a copy thereof is given to each of the defendants. On motion of counsel for the defendants,

It Is Ordered that the defendants be allowed two weeks to file motions attacking the indictment, and that this case be continued for plea until after ruling on motions and that the defendants be allowed to remain on their own recognisance.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant Rex L. Neely moves to dismiss the Indictment and each and every Count thereof on the ground that each Count is fatally defective in that it does not state facts sufficient to constitute an offense against the United States.

WHITNEY & LaPRADE,
/s/ By LOUIS B. WHITNEY.

Notice of Motion

To United States of America, Plaintiff; Jack D. H. Hays, Esquire, United States Attorney, Plaintiff's Attorney:

Please Take Notice that upon the Indictment herein in the above entitled and numbered cause, and upon the points and authorities herewith served upon you, the undersigned will move this Court at the next regular Law and Motion Calendar of this Court, in the United States Court House, Phoenix, Arizona, at 10:00 o'clock A.M. in the forenoon of November 18, 1957, or as soon thereafter as counsel can be heard, for an order dismissing the indictment and each Count thereof.

Dated this 5th day of November, 1957.

WHITNEY & LaPRADE,
/s/ By LOUIS B. WHITNEY.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 5, 1957.

In the United States District Court

For the District of Arizona

October 1957 Term

At Phoenix

Minute Entry of

Wednesday, November 27, 1957

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

It Is Ordered that Motion to Dismiss of defend-
ant, Rex L. Neely, is denied.

In the United States District Court

For the District of Arizona

October 1957 Term

At Phoenix

Minute Entry of

Monday, December 9, 1957

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

This case is called for plea this day as to defend-
ant Rex L. Neely and trial setting as to defendants,
Rex L. Neely and Joe L. Short. The defendant, Rex
L. Neely, is present in person with his counsel,
Louis B. Whitney, Esq. Said defendant waives
reading of the indictment and pleads not guilty,
which plea is entered.

It Is Ordered that this case is set for trial Wed-
nesday, September 10, 1958, at ten o'clock a.m. as
to both defendants herein.

In the United States District Court
For the District of Arizona

April 1958 Term

At Phoenix

Minute Entry of
Friday, September 12, 1959
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

* * * * *

The Government having rested its case, in the absence of the jury, the defendant Rex L. Neely, by his counsel Louis B. Whitney, Esq., now moves for judgment of acquittal on each and every count of the indictment.

It Is Ordered that said motion for judgment of acquittal is denied.

In the United States District Court
For the District of Arizona

April 1958 Term

At Phoenix

Minute Entry of
Thursday, September 18, 1958
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

* * * * *

In the absence of the jury, the defendant Rex L. Neely by his counsel Louis B. Whitney, Esq., at the close of all the evidence, now moves for judgment of

acquittal on each and every count of the indictment.

It Is Ordered that the Motion for Judgment of Acquittal of the defendant Rex L. Neely is denied.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Rex L. Neely, Not Guilty as charged in count I; Not Guilty as charged in count III; Guilty as Charged in count V; Not Guilty as charged in count VII; Not Guilty as charged in count VIII; Not Guilty as charged in count IX; Not Guilty as charged in count X; Not Guilty as charged in count XI; Not Guilty as charged in count XII.

/s/ M. B. BARTLETT,
Foreman.

[Endorsed]: Filed September 19, 1958.

[Title of District Court and Cause.]

MOTION FOR ADDITIONAL TIME TO FILE CERTAIN MOTIONS

Comes Now Rex L. Neely, one of the defendants in the above entitled and numbered action and moves the Court for an order granting defendant up to and including October 6, 1958, within which to file a Motion for New Trial under Rule 33 and/or Motion in Arrest of Judgment under Rule 34 of the Federal Rules of Criminal Procedure.

Dated September 24, 1958.

WHITNEY & LaPRADE,
/s/ By LOUIS B. WHITNEY,
Attorneys for Rex L. Neely.

Order

Upon reading the foregoing motion, and good cause appearing therefor, It Is Ordered that the defendant Rex L. Neely have up to and including October 6, 1958 within which to file a Motion for a New Trial under Rule 33 and/or a Motion in Arrest of Judgment under Rule 34 of the Federal Rules of Criminal Procedure.

Dated September 24, 1958.

/s/ DAVE W. LING,
U. S. District Judge.

[Endorsed]: Filed September 24, 1958.

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

The defendant, Rex L. Neely, moves the Court to arrest the judgment on Count Five in the indictment for the following reasons:

1. Count Five of the indictment does not state facts sufficient to constitute an offense against the United States.

2. The Agricultural Adjustment Act is unconstitutional in that the Constitution does not grant to Congress any power to pass the Agricultural Adjustment Act.

Dated at Phoenix, Arizona, this 6th day of October, 1958.

WHITNEY & LaPRADE,
/s/ By LOUIS B. WHITNEY,
Attorneys for Rex L. Neely.

[Endorsed]: Filed October 6, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant, Rex L. Neely, moves the Court to grant him a new trial on Count Five in the indictment for the following reasons:

1. The Court erred in denying defendant's Motion for Acquittal made at conclusion of all the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The Court erred in charging the jury and in refusing to charge the jury as requested.

Dated at Phoenix, Arizona, this 6th day of October, 1958.

WHITNEY & LaPRADE,
/s/ By LOUIS B. WHITNEY,
Attorneys for Rex L. Neely.

[Endorsed]: Filed October 6, 1958.

In The United States District Court
For The District of Arizona
October 1958 Term At Phoenix
Minute Entry of
Monday, October 27, 1958
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

Motion in Arrest of Judgment and Motion for
New Trial of defendant, Rex L. Neely, are called
for hearing. Wm. A. Holohan, Esq., Assistant
United States Attorney appears for the Govern-
ment. Louis B. Whitney, Esq. appears for the de-
fendant, Rex L. Neely. Said Motions are argued
by respective counsel.

It Is Ordered that the record show said motion
in arrest of judgment and motion for new trial are
submitted.

In The United States District Court
For The District of Arizona
October 1958 Term At Phoenix
Minute Entry of
Monday, December 29, 1958
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

It Is Ordered that the Motion in Arrest of Judg-

ment and Motion for New Trial of defendant Rex L. Neely, are denied, and that this case is set for sentence Monday, January 12, 1959 at ten o'clock a.m. as to both defendants.

In The District Court of the United States
For The District of Arizona

No. C-14746 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REX L. NEELY,

Defendant.

JUDGMENT

On this 12th day of January, 1959, at Phoenix, Arizona, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of violating Title 18, Section 201, United States Code, (bribery), as charged in count 5.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine in the sum of \$1,000.00, and that the execution of

said judgment is stayed for a period of 24 hours, on said count 5.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed January 12, 1959.

[Title of District Court and Cause.]

ORDER FIXING BAIL PENDING APPEAL

Application having been made herein by counsel for appellant for bail pending appeal, upon consideration thereof, It Is Ordered that said motion be, and it is hereby granted, on condition that bail be fixed at \$2,000.00, and that the fine imposed of \$1,000.00 be paid conditionally to the Clerk of this Court, and It Is Hereby Ordered that upon the payment of said amounts to the Clerk of this Court, that the execution of the sentence requiring the defendant to pay a fine of \$1,000.00 be stayed under Rule 38 (a) (3) of the Federal Rules of Criminal Procedure and that said moneys be held by the Clerk of this Court, pending the final determination of said appeal.

And It Is Further Ordered that the Clerk deposit said moneys in the Registry of this Court, subject to the further order of this Court.

Dated this 12th day of January, 1959.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed January 12, 1959.

[Title of District Court and Cause.]

BOND PENDING APPEAL

Know All Men By These Presents:

That, Whereas, on the 12th day of January, 1959 in a suit pending in said Court between the United States of America, plaintiff, and Rex L. Neely, defendant, a judgment and sentence was rendered against the said Rex L. Neely, that he paid a fine of One Thousand Dollars (\$1,000.00), and the said Rex L. Neely has taken an appeal to the United States Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and notice of such appeal in duplicate having been filed with the Clerk of the District Court of the United States for the District of Arizona, in the manner and within the time required by law and the rules of court in such cases made and provided, and

Whereas, after said notice of appeal had been filed as aforesaid, the United States District Court for the District of Arizona entered an order fixing bail pending appeal in the sum of Two Thousand and No/100 Dollars (\$2,000.00), as will more fully appear by said order fixing bail pending appeal on file herein; that \$2,000.00 in cash has been deposited in the Register of this Court.

Now, the condition of the above application is such that the said Rex L. Neely shall appear in the United States Court of Appeals for the Ninth Circuit in San Francisco, California, or such other

place as may be appointed by said Court, on such date or dates as may be appointed for the hearing of said cause in said Court, until finally discharged therefrom and shall abide by and obey all orders made by said United States Court of Appeals for the Ninth Circuit in said cause, and shall see to it that a fine of One Thousand Dollars (\$1,000.00) imposed by the United States District Court for the District of Arizona is paid, if said case is affirmed by the United States Court of Appeals for the Ninth Circuit, and if reversed for a new trial, he will appear therefor at such time as may be ordered, then the above obligation shall be void, else to remain in full force and effect.

/s/ REX L. NEELY,
Defendant-Appellant.

[Endorsed]: Filed January 13, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF REX L. NEELY

Name and address of appellant: Rex L. Neely, 699 North Washington, Chandler, Arizona.

Name and address of appellant's attorneys: Louis B. Whitney, Loretta S. Whitney, and Paul W. LaPrade, 810 Luhrs Tower, Phoenix, Arizona.

Offense: Bribery, to-wit, tendering a check in the amount of \$1,750.00 to one Joe L. Short, an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an Agency of the

United States, with intent to influence said Joe L. Short in his official capacity, in violation of Title 18, U.S.C.A., Section 201.

Concise statement of judgment or order, giving date, and any sentence: \$1,000.00 fine on Count V in the Indictment; date of sentence, January 12, 1959. Not committed and fine not paid; application to be made by appellant Rex L. Neely for bail.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment dated January 12, 1959.

Dated January 12, 1959.

/s/ LOUIS B. WHITNEY,
/s/ LORETTA S. WHITNEY,
/s/ PAUL W. LaPRADE.

[Endorsed]: Filed January 12, 1959.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Pursuant to the Defendant's application filed herein and good cause appearing therefor, it is

Ordered that the time for the Defendant-Appellant to file and designate the record on appeal in the United States Court of Appeals for the Ninth Circuit, be, and the same hereby is, extended to and including March 30, 1959.

Dated this 16th day of February, 1959.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed February 16, 1959.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD

United States of America,

District of Arizona—ss.

I, William H. Loveless, Clerk, of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in the case of United States of America, Plaintiff, vs. Rex L. Neely, Defendant, numbered C-14746 Phx., on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said case, and that the attached copies of minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said cause as designated, and the same are as follows, to-wit:

1. Indictment.
2. Minute entry of arraignment, October 28, 1957.
3. Motion of Rex L. Neely to dismiss Indictment.

4. Minute entry of November 27, 1957 (order denying Rex L. Neely's motion to dismiss Indictment).
5. Minute entry of December 9, 1957 (plea of not guilty).
6. Minute entry of defendant Rex L. Neely's motion for judgment of acquittal at close of Government's evidence and of order denying said motion.
7. Minute entry of defendant Rex L. Neely's motion for judgment of acquittal at close of entire case and of order denying said motion.
8. Verdict of jury as to defendant Rex L. Neely.
9. Transcript of testimony, including instructions to jury (Volumes 1 and 2).
10. Order enlarging time to file motion for new trial and motion in arrest of judgment.
11. Motion of Rex L. Neely in arrest of judgment.
12. Motion of Rex L. Neely for new trial.
13. Minute entry of argument on Motion for New Trial and Motion in Arrest of Judgment, October 27, 1958.
14. Minute entry of orders denying Rex L. Neely's motion for new trial and his motion in arrest of judgment, December 29, 1958.
15. Judgment assessing fine.
16. Order fixing bail pending appeal.
17. Bond of Rex L. Neely pending appeal.
18. Notice of Appeal.
19. Order Extending Time to File Record on Appeal.
20. Designation of Contents of Record on Appeal.

I further certify that all original exhibits in evidence are transmitted herewith as a part of this record on appeal as designated, to-wit:

Government's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9a, 10, 11a, 11b, 11c, 11d, 11e, 11f, 11g, 12a, 12b, 12c, 12d, 12e, 12f, 13a, 13b, 13c, 14a, 14b, 14c, 15, 16a, 16b, 16c, 17a, 17b, 17c, 18a, 18b, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32, except exhibits 1, 2 and 3 which were withdrawn by order of the court, on stipulation.

Defendant's exhibits F, G, H, I, J, K, L, M, R, S and T.

Witness my hand and the seal of said Court this 27th day of March, 1959.

[Seal] WM. H. LOVELESS,
Clerk.

In The United States District Court
For The District of Arizona

No. C-14,746 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REX L. NEELY and JOE L. SHORT,

Defendants.

TRANSCRIPT OF PROCEEDINGS

United States Courthouse, Phoenix, Arizona, commencing Wednesday, September 10, 1958, 10:00 A.M.

Before: Honorable Dave W. Ling, Judge, and a Jury.

Appearances: Jack D. H. Hays, United States District Attorney, William A. Holohan, Asst. United States Attorney, for the Plaintiff. Whitney & LaPrade, By Louis B. Whitney, Loretta Whitney, and Paul W. LaPrade, for the Defendant Rex L. Neely. William A. Stanfield, for the Defendant Joe L. Short. [1]*

Proceedings

The Clerk: Case Number C-14,746 Phoenix. United States of America, Plaintiff, versus Rex L. Neely and Joe L. Short, Defendants, for trial.

The Court: Ready, gentlemen?

Mr. Holohan: The Government is ready, your Honor.

Mr. Whitney: Defendant Neely is ready.

Mr. Stanfield: Defendant Short is ready.

The Court: Call the names of 28 jurors. As your names are called, come forward, please.

(Thereupon the Jury was duly impanelled and sworn to try the issues.)

(After which Counsel for the Government made an Opening Statement to the Jury.)

Mr. Whitney: If the Court please, Defendant Neely reserves his statement.

The Court: Very well. You may call your first witness.

Mr. Holohan: Tom Davis, please. [2]

* Page numbers appearing at top of page of Reporter's Transcript of Record.

TOM C. DAVIS

called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Holohan): Will you state your name, please. A. Tom C. Davis.

Q. Where do you live, Mr. Davis?

A. Chandler, Arizona.

Q. By whom are you employed?

A. Federal Government.

Q. In what capacity?

A. Office Manager, Pinal County ASC Office.

Q. What does ASC stand for?

A. Agricultural Stabilization and Conservation.

Q. Is that a part of the Department of Agriculture? A. Yes, sir.

Q. In your capacity as Office Manager of the Pinal County ASC Office, do you have custody of the various government records that are contained there? A. Yes, sir.

Mr. Holohan: May these exhibits be marked for identification as 1, 2 and 3, all for identification.

(Said Documents were marked as Government's Exhibits 1, 2, and 3 for identification.)

Q. (By Mr. Holohan): In response to a subpoena by the Government, did you cause certain records to be brought here to Court?

A. Yes, sir.

Q. Starting, then, with Government's Exhibit 1 for identification, I will ask you to examine that, and do you recognize it? A. Yes, sir.

(Testimony of Tom C. Davis.)

Q. Is that a record of the Pinal County Agricultural Stabilization and Conservation Committee?

I am going to call it ASC to make it easier.

A. Yes, sir. It is the 1954 Listing Sheets.

Q. What is a Listing Sheet?

A. It is a sheet on which the history, the crop land, the man's name, the farm number that is assigned to a given farm, the actual history of the farm is given on it, and the actual mathematical calculations that are required to work out an allotment are made on that sheet.

Q. And that covers the crop year 1954?

A. Yes, sir.

Q. How are farms designated on the Listing Sheet, and specifically Government's Exhibit 1 for identification?

A. By number and by name, the name of the operator as well as the owner.

Q. Is that a record that is required to be kept in the [4] regular course of the Governmental business there? A. Yes, sir.

Q. And that record is one that you have custody over? A. Yes, sir.

Q. Now similarly with regard to Government's Exhibit 2 for identification, do you recognize that document or exhibit? A. Yes, sir.

Q. What is it?

A. The 1955 listing sheets.

Q. Is that again a record from your agency down there? A. Yes, sir.

Q. And kept in the regular course of your gov-

(Testimony of Tom C. Davis.)

ernmental business? A. Yes, sir.

Q. And of which you have custody?

A. Yes, sir.

Q. You have spoken of it as the 1955 Listing Sheet? A. Yes, sir.

Q. The same answers with regard to the 1954 Listing Sheet also apply to the 1955?

A. Except in a great many instances in the 1955 Listing Sheets, they did not show the owner of the land. They merely have shown the operator.

Q. What is the difference? [5]

A. One man owns the property, whereas he might farm it himself and be the owner and operator. In another instance he might own the land and live in California, and lease it to someone else.

Q. In which case the person actually managing the farm operation is known as the operator?

A. Is the operator, yes, sir.

Q. And in many instances, in the 1955 Listing Sheet, he would be the person designated there?

A. It should be the operator, is what is designated there.

Q. All right. Once a farm has been given a number by the ASC Committee down there in Pinal County, does that number continue from year to year?

A. Yes, sir, it continues from year to year. There are changes made in the numbers, in the system of numbering, and the like, but there is a continuation of that number, or if there is a change-over from one set of numbers to another.

(Testimony of Tom C. Davis.)

Q. I will hand you what has been marked Government's Exhibit 3 for identification, and I will ask you to examine that exhibit.

Do you recognize it?

A. Yes, sir.

Q. What is it?

A. It is the 1956 Listing Sheets.

Q. A record kept by your office down there? [6]

A. Yes, sir.

Q. In the regular course of Governmental business?

A. Yes, sir.

Q. And of which you have custody?

A. Yes, sir.

Q. The same description applies to it as applied to the others?

A. As applied to the other two, yes, sir.

Mr. Holohan: May this be marked as Government's Exhibit 4 for identification. And will you mark these as 5, 6, 7, and 8.

The Clerk: Government's Exhibits 4, 5, 6, 7, and 8 for identification.

(Said Items were marked as Government's Exhibit 4, 5, 6, 7, and 8, for identification.)

Q. (By Mr. Holohan): Now, Mr. Davis, I will hand you what has been marked Government's Exhibit 4 for identification, and ask you to examine that. Can you state whether you recognize it?

A. Yes, sir.

Q. What is it?

A. Marketing Card Register for 1954.

Q. And is that a record that is kept in the regu-

(Testimony of Tom C. Davis.)

lar course of Governmental business at the ASC Committee down in Pinal County? [7]

A. Yes, sir.

Q. A record of which you have custody?

A. Yes.

Q. What is a Marketing Card Register?

A. Well, in the case of allotment crops, a Marketing Card is issued to the farmer so that he may sell the crop.

The register of the marketing cards is merely the summary of who each card is issued to, the man's name, who it is issued to, the marketing card number, and the date.

Q. Government's Exhibit 4 applies to what year?

A. 1954.

Q. And to what crop?

A. Upland cotton, Short Staple cotton, whichever name you care to use.

Q. Upland cotton or Short Staple cotton?

A. Yes.

Q. I hand you what has been marked Government's Exhibit 6 for identification, and ask you whether you recognize that? A. Yes, sir.

Q. What is it?

A. It is a marketing card register for 1955 for Extra Long Staple cotton.

Q. Is that a record kept in the regular course of governmental business by the Pinal County ASC Office? A. Yes, sir. [8]

Q. And is it a record which is under your custody and control as manager down there?

(Testimony of Tom C. Davis.)

A. Yes, sir.

Q. What is Extra Long Staple?

A. The variety of cotton. The other was the Short Staple, this is the Long Staple, as it is referred to.

Q. This Government's Exhibit 6 for identification which you hold in your hand is for what year?

A. 1955.

Q. And for Extra Long Staple cotton?

A. Extra Long Staple cotton.

Q. And again with respect to the Extra Long Staple cotton, is the same procedure followed with regard to Marketing Cards, numbers, and so forth, dates, and so forth? A. Yes, sir.

Q. But a separate marketing card is given for Extra Long Staple, and a separate marketing card is given for the Upland or Short Staple?

A. Yes, sir.

Q. I will hand you what has been marked Government's Exhibit 5 for identification, and ask you with regard to that exhibit whether you recognize it?

A. Yes, sir.

Q. What is it?

A. It is a Marketing Card Register for Upland cotton for [9] 1955.

Q. Is that a record of the Pinal County ASC office? A. Yes, sir.

Q. Is it one that is kept regularly in the course of your governmental business, and of which you have custody and control? A. Yes, sir.

Q. All right, for the 1955 Upland Marketing

(Testimony of Tom C. Davis.)

Card Register, it is kept in the same manner that you have described as to the other exhibits?

A. Yes, sir.

Q. Now, I will hand you what has been marked Government's Exhibit 7 for identification, and ask you to examine that exhibit. A. Yes, sir.

Q. What is Government's Exhibit 7 for identification?

A. Register of Marketing Cards for 1956, and I presume that this is the Short Staple that is shown here. Yes, sir, this is the Short Staple.

Q. And again is that a record kept by the Pinal County ASC Office? A. Yes, sir.

Q. Is it kept in the regular course of governmental business of which you have custody and control? A. Yes, sir. [10]

Q. And kept in a similar manner to the other exhibits that you have described, 4 through 7?

A. Yes, sir.

Q. Now, I will hand you what has been marked Government's Exhibit 8 for identification, and ask you with regard to that whether you recognize that exhibit? A. Yes, sir.

Q. What is that?

A. In 1955, they were keeping this record on the Release and Reapportionment of Cotton.

Q. And who is the "they"?

A. The Pinal County ASC Office.

Q. Is that a record that is kept regularly in the office there and part of your governmental business? A. It was kept regularly then.

(Testimony of Tom C. Davis.)

Q. At that time? A. Yes.

Q. That practice has since ceased in Pinal County?

A. No, sir, it is incorporated into another record at the present time.

Q. You have maintained that record as part of the records of the office down there?

A. Yes, sir.

Q. And during the crop year of 1954, it was a record kept in the regular course of business, insofar as you know? [11] A. Yes.

Q. And you have custody over Government's Exhibit 8 for identification, as part of the records down there in the ASC Office in Pinal County?

A. Yes, sir.

Mr. Whitney: What was the number of that record?

Mr. Holohan: Government's Exhibit 8 for identification.

May these be marked as Government's Exhibits 9 and 10 for identification.

(Said Items were marked as Government's Exhibits 9 and 10 for identification.)

Q. (By Mr. Holohan): I hand you Government's Exhibit 9 for identification, and ask you to examine that exhibit. A. Yes, sir.

Q. Do you recognize it? A. Yes, sir.

Q. And what is it? A. A Farm Folder.

Q. When you say a Farm Folder, what do you mean by that?

A. In the normal course of business in the ASC

(Testimony of Tom C. Davis.)

Office, each farm has a number. Each farm then in turn has a farm folder, where the pertinent information on that farm is kept.

Q. The pertinent information, their various Government Forms, and so forth?

A. Forms, notifications, any correspondence, and so forth. [12]

Q. Now, you have described Government's Exhibit 9, I believe it is, for identification?

A. Yes.

Q. As such a Farm Folder? A. Yes.

Q. For what farm? A. Farm Number 595.

Q. Is that a record, or the document there, is that kept in the regular course of your governmental business down there? A. Yes, sir.

Q. And is it part of the Government records of which you have custody and control?

A. Yes, sir.

Q. Finally, I will hand you Government's Exhibit 10 for identification, and ask you whether you recognize that exhibit? A. Yes, sir.

Q. What is 10 for identification?

A. The Agricultural Conservation Program which is handled through the ASC Office pays the farmer to do a certain amount of conservation work on his farm under given conditions.

This is a list of the business that went on during 1954 and 1955, the letters of transmittal, the cover sheets for those letters of transmittal.

Q. Concerning these so-called agricultural conservation [13] practices? A. Yes, sir.

(Testimony of Tom C. Davis.)

Q. Is that record kept regularly in the course of business by the ASC Committee in the Pinal County Office? A. Yes, sir.

Q. Is it a record of which you have custody and control? A. Yes, sir.

Mr. Holohan: You may cross examine the witness.

Cross Examination

Q. (By Mr. Whitney): Mr. Davis, how long did you say you had been Office Manager?

A. I went to work there the 15th of February, Mr. Whitney.

Q. This year? A. Yes, sir.

Q. And did you ever work for that office before?

A. No, sir.

Q. Now, with these exhibits that you have identified, they are just folders and listing sheets that you found in the office? A. That is right.

Q. And with reference to the folders, do you know whether or not, of your own knowledge, that they are complete? [14] A. No, sir.

Q. With reference to this Listing Sheet, you still keep those? A. Yes, sir.

Q. You have a different method of measuring this year? A. Yes, sir.

Q. Than you had previous years, is that right?

A. That is correct.

Q. And you posted it on the bulletin board down there, that the measurements would not be made as heretofore, is that right? A. That is correct.

(Testimony of Tom C. Davis.)

Q. Now, when you measure land, you get the farmer to come down while the measurement is going on, is that right?

A. The farmer or his representative, yes, sir.

Q. That wasn't done theretofore?

A. No, sir.

Q. No? A. No, sir, it was not done before.

Q. And in connection with the listing sheets which I examined down in your office here several days ago, where did you get the information to put on those sheets? I am asking you now so that the jury will understand.

A. Do you mean the original Listing Sheets when the allotment started? [15]

Q. These listing sheets here that have been identified as Government's Exhibit 1, 2, and 3.

I will take number 3 here on top. Where is the information gotten that goes into those?

A. Well, on any of these, the information is primarily picked up from the Listing Sheets from the year before.

Originally, when the allotments first started in 1950, the farmers filed a report with the ASC offices telling them how many acres of various crops they had grown over a period of time, and that was used for the history. And then again in the fall of 1953, I believe it was necessary for the farmers to once again report this acreage, and that was the basis for starting out the original 1954, which I believe is Government's Exhibit number 1.

Q. Now, take the year 1953, there was no Gov-

(Testimony of Tom C. Davis.)

ernment restriction then on cotton that year, was there? A. No, sir, not that I remember.

Q. They started that program again in 1954?

A. Yes, sir.

Q. So these listing sheets were 1954, 1955, and 1956? A. Yes, sir.

Q. Do you get any of the information from those listing sheets from what is known as a Control Register? A. A Control Register?

Q. Yes, sir. [16]

A. I don't know what you mean by a control register, Mr. Whitney.

Q. These documents that Mr. Hays handed me this morning, or rather I think you did, what do you call those?

A. That would be a good name, Mr. Whitney, just what you wanted to call them. These are a record kept in the office which is not required to be kept, and just about whatever name anyone might care to assign it would be fine.

And this year we are referring to them as Community Record Sheets.

Q. And you have regular printed sheets made up this year? A. Mineographed sheets.

Q. And they had those before, did they?

A. No, sir, not that I know of. As I understand it, they used these columnar pads.

Q. The mimeographed sheets you have this year contain some columns on it that are not shown in this document? A. Yes, sir.

Q. Is that correct?

A. Yes, sir, I believe so.

(Testimony of Tom C. Davis.)

Q. And what do you use those for? I am talking about the ones you are using now.

A. The ones being used now, we are attempting to have a record there which will be of help to us in determining when [17] a particular farm is in compliance, and when a marketing card can be issued for that farm, when the marketing card is issued.

Q. And what were these used for?

A. Well, as best I can see, they were used for basically the same thing, showing the date the notices were mailed, showing the allotment, the acreage——

Mr. Holohon: I object to his going any further into the document unless he can show he knows of his own knowledge.

The Court: All right.

Q. (By Mr. Whitney): Do you know of your own knowledge what they were used for?

A. No, sir.

Q. But you used practically the same thing now, with the exception of an extra column or two?

A. Basically, yes, sir. It is approximately the same.

Q. And what years did these cover?

A. I believe they are 1955 and 1956, unless I am mistaken. I frankly don't see a date on this. Yes, sir, 1956 for this one.

Q. 1956? A. Yes, sir.

Q. And the one under it? A. 1956——

Q. The one that was marked in the other case, Government's [18] Exhibit 6.

(Testimony of Tom C. Davis.)

A. This is 1955.

Q. That was the one in the other case that was marked—it was not marked, apparently.

Mr. Whitney: Mr. Clerk, I would like to have these marked for identification.

The Court: The Court will stand at recess until two o'clock. Keep in mind the Court's admonition, that during the recess you are not to discuss the case among yourselves, nor permit anyone to discuss it with you. Also avoid forming or expressing any opinion upon any subject connected with this case.

(The noon recess was taken.) [19]

Afternoon Session

Two o'clock p.m.

Court resumed pursuant to recess.

Present: Same as before.

The Court: You may continue.

Mr. Whitney: Will you mark these as exhibits for identification.

The Clerk: Defendant's Exhibits A and B for identification.

(Said Documents were marked as Defendant's Exhibits A and B for identification.)

TOM C. DAVIS

resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Whitney): Now, Mr. Davis, referring to Defendant's Exhibits A and B for identifi-

(Testimony of Tom C. Davis.)

cation, you say these are no part of the official records?

A. No, sir. So far as I know, they are not required in any official sense.

Q. What are they used for? [20]

A. Merely for our own use, to determine when the farms are in compliance, to have a complete record we can refer to rapidly, and check and follow up on.

Q. Then they have some purpose?

A. Yes, they have a purpose.

Q. In connection with the other records?

A. Yes, sir.

Mr. Whitney: I see. Now, then will you mark this for identification please.

(Said Document was marked as Defendant's Exhibit C for identification.)

Q. (By Mr. Whitney): Mr. Davis, referring to Defendant's Exhibit C for identification, tell me what that is.

A. This is the little form we fixed up in the County Office that we use for approximately the same purpose.

Q. That A and B?

A. That A and B were used for in years gone by.

Q. It has other columns, however, this form you have in your hand, Exhibit C for identification?

A. Yes, sir. Well, for identification—I don't remember the way the others were headed up well enough to say. I don't believe it showed the oper-

(Testimony of Tom C. Davis.)

ator's name, merely the farm number, unless I am mistaken.

Q. I will hand you "A" so you can make some comparison, and tell us what the difference is. [21]

Mr. Holohan: I believe we will have to object to comparing these, and taking the evidence from them before they are even offered.

The Court: He is going to compare them. If it isn't in evidence, I will see to that.

A. (By the Witness): The major difference is that we have Soil Bank to take into consideration now, and this identified the farms by farm number, whereas we identify them both by farm number and name at the present time.

Q. (By Mr. Whitney): And this Exhibit "A" doesn't identify them by name?

A. No, sir, I don't believe so.

Q. Just by farm number?

A. Just by farm number, to the page I opened to.

Q. And Exhibit "C" not only does it by farm number, but by farm name? A. Yes.

Q. And that is used in your office in connection with your work? A. That is right, sir.

Q. Exhibit "C" is just the same as Exhibit "A" and "B" prior to the time you came to that office?

A. I presume it is exactly the same as they would use, sir. So far as I know, yes, sir.

Q. Now, in connection with the listing sheets, Government's [22] Exhibits 1 and 2 and 3 for identification, referring to number 1, which is the 1954

(Testimony of Tom C. Davis.)

Listing Sheets. Will you tell us what is shown on those various columns. A. Well——

Q. Of course, you didn't make them up?

A. No, sir. It starts out with the farm number, serial number, the name of the operator, the name of the owner. It shows the total crop land, and the deductible crop.

Back at that time they were basing a certain amount of weight to the amount of water that was available on a given farm. Just what their basis for that was I do not know.

And I would presume that that is their difference between the total crop land and the deductible crops here.

Q. Some of those figures are made out from formula, and it would take a mathematician to figure it out?

A. I can't give you the basis for that. I don't know what the basis for that is. I don't know what the basis for the adjusted crop land was.

Q. But it is done by formula?

A. I couldn't answer that, I don't know.

Q. Go ahead.

A. Then the next three columns here give you your history of the planted cotton. Then it is shown over here under Highest Planted Crop out of the three years the history was being adjusted from. Then the total crop land, then the [23] adjusted crop land. From there on it is merely a matter of multiplying the factor against the highest planted, or against the adjusted crop land. I couldn't tell

(Testimony of Tom C. Davis.)

you without a calculator, and then going ahead and making the mathematical computations to end up with a cotton allotment over here for that particular farm.

Q. The farmer has nothing to do with making up those adjustments, does he? A. No, sir.

Q. He never sees them?

A. Yes, sir. Most of the farmers during the course of the year will come in to see them. They are open to the farmers whenever they want to see them.

Q. Whenever they want to see them they could?

A. Yes.

Q. Could the ordinary farmer look at that sheet and understand it?

A. I would hate to answer that. I don't know.

Q. You yourself can't understand some of it?

A. Part of it I do not understand.

Q. I see. Do you know of a farm 596?

A. No, sir, I am afraid I would have to have my memory refreshed on that.

Q. Is there a farm 596 in the 1954 listing Sheets, Government's Exhibit 1 for identification? [24]

A. Yes, sir. 596.

Q. And who does that show?

A. It shows Mr. A. C.—

Mr. Holohan: We object to what that shows. If counsel wants to pursue that at this time, we offer Government's Exhibit 1 for identification in evidence as Government's Exhibit 1.

The Court: It may be received.

(Testimony of Tom C. Davis.)

Mr. Whitney: You want to offer this?

Mr. Holohan: Yes.

Mr. Whitney: No objection.

The Court: It may be received.

The Clerk: Government's Exhibit 1 in evidence.

(Said Listing Sheets were received in evidence as Government's Exhibit 1.)

A. (By the Witness): Mr. A. C. Stewart is shown.

Q. (By Mr. Whitney): As the operator?

A. And as the owner.

Q. I see. And 595?

A. John Woodruff is the operator. Kemper Marley is the owner.

Q. I assume it is shown on the 1955 and 1956?

A. Not without looking, I don't know, but I presume they would, sir.

Q. When you went into the office, did you make any [25] attempt to familiarize yourself with the Listing Sheets, Government's Exhibits 1, 2, and 3?

A. No, sir, because we were primarily interested in the 1958, and not in that, so I haven't made any attempt to——

Q. I see. Now, did you learn while you were in that office, since you have been there, that the practices in that office have been rather loose?

A. Yes, sir.

Q. Heretofore, is that right? A. Yes, sir.

Q. Very loose? A. Yes, sir.

Q. And that you found that farmers in 1954,

(Testimony of Tom C. Davis.)

1955, and 1956 overplanted, a great many of them, in that County?

A. You mean they were overplanted when they were originally measured, now?

Q. That is right. A. Yes, sir.

Q. Did you make any examination of Defendant's Exhibits A and B? A. No, sir.

Q. To determine—— A. No, sir.

Q. You never made any examination?

A. No, sir. [26]

Q. Now, the measurements that are now being made, I mean in 1958, of the farmers' land in cotton is done a lot differently from what it was in 1954, 1955, and 1956?

A. As I understand the way it was done then, yes, sir.

Q. Well, you know, Mr. Davis, as a matter of fact, it is? A. Yes, that is true.

Mr. Whitney: I see. Mark this for identification, please.

(Defendant's Exhibit D marked for identification.)

Q. (By Mr. Whitney): Referring to Defendant's Exhibit D for identification, I believe you have had a copy of this made for me when I was down there, do you remember that, on the bulletin board?

A. Yes, sir.

Q. And now that states that the measurements will be different?

A. Yes, sir, in a different manner.

Mr. Whitney: I see. I offer "D" in evidence.

(Testimony of Tom C. Davis.)

Mr. Holohan: We object to it as being wholly immaterial to the case at issue now.

The Court: Well, we can re-offer it, you can re-offer it on your defense.

Mr. Whitney: Pardon?

The Court: You can re-offer it again on the defense.

Mr. Whitney: Thank you. [27]

Q. (By Mr. Whitney): Were you with the office down there at Casa Grande on and prior to October 11, 1957? A. No, sir.

Q. From an examination that you have made since you have been in the office, you did determine, as you stated, that a good many farmers had over-planted? A. Yes, sir.

Q. In 1954, 1955, and 1956? A. Yes, sir.

Q. And many of those farmers did not destroy their cotton? A. No, sir.

Q. You don't know that?

A. No, sir. So far as I know, the largest part of them did destroy.

Q. There were some of them that didn't?

A. Well, now, you are asking a question I can't answer, sir. I don't know.

Mr. Whitney: I think that is all.

Cross Examination

Q. (By Mr. Stanfield): Mr. Davis, you are the, shall I use the term current Office Manager for the ASC Committee down in Casa Grande?

(Testimony of Tom C. Davis.)

A. That is correct. [28]

Q. In Pinal County? A. Yes.

Q. Did you tell us earlier when you began your employment there?

A. I don't remember. It was the 15th of February of this year.

Q. Prior to that date, what was your employment? A. Farmer.

Q. Was this your first experience with the Department of Agriculture as an employee?

A. Yes, sir.

Q. When you were so employed, were you directly employed as Office Manager?

A. Yes, sir.

Q. Were you given to understand particular responsibilities and duties that were to be imposed on you?

A. To a degree. I don't believe at that time I understood the full extent of them, no, sir.

Q. Do you now understand the full duties of your post? A. Well, I think that I do.

Q. Would you briefly kind of outline what your duties are?

A. Well, primarily, the office manager of an ASC office is employed by the County Committee in order to carry their policies out in the day by day operations of the office. And [29] to attempt as best he can to keep current with the various changes in the program that are administered from there, and see to it that those changes are incorporated into

(Testimony of Tom C. Davis.)

the normal functions of the office, and basically, that is approximately what it amounts to. We could go into more detail on a given field of it.

Q. I may ask you one or two questions about that.

Aside from the cotton allotment program, are there other programs that are handled through the office by you? A. Yes, sir.

Q. Would you enumerate those?

A. Well, there is the acreage reserve program under the Soil Bank this year. There is the Agricultural Conservation Program. There is the Wool Program. There is the Price Support Program.

Those are the fundamental basic programs that are handled through that office.

Q. Do you know how many of these, if any, involve handling of funds? A. You mean——.

Q. With relationship to the farmers.

A. You mean insofar as passing a check or draft on to the farmers?

Q. Yes.

A. Your Soil Bank, your Wool, and Price Support are the [30] only ones where you directly hand a check on to the farmer, or mail a check, draft on to the farmer.

Q. Would it be a fair statement that the ones in which you do not handle the money yourself involve procedures that eventually involve money or checks? A. A part of them, yes, sir.

(Testimony of Tom C. Davis.)

Q. I see. Aside from the Soil Bank, which I assume became effective, I believe, in 1956, does the program, to your knowledge, differ greatly from 1954 and 1955?

A. Well, frankly, since I have been there I have been so busy trying to catch up to where it is at the present time, that I can't answer that very well.

Q. You don't know really?

A. No, sir, I don't know.

Q. Among other things, as a manager of the office there you are required to formulate and prepare a budget for the office each year, are you not?

A. That is correct.

Q. And in fact you prepared one for the fiscal year of June, 1958, to July, 1959?

A. That is correct.

Q. Do you have in your own mind at this moment a recollection of approximately what the budget for this year in which we are in amounted to?

A. Approximately 60 thousand dollars.

Q. Do you have any recollection of what the budget for the prior year was?

A. Approximately the same.

Q. Do you remember who your predecessor is?

A. There?

Q. Yes. A. Ed Ketterling.

Q. Do you have any knowledge of when he started his employment?

A. No, I have never looked in the Personnel Folder to see.

(Testimony of Tom C. Davis.)

Q. Do you have off-hand any recollection of the number of employees that you now have engaged there at the office?

A. Normally, we have six employees there at the office.

Q. Is this normal?

A. That's right, normally that's what we have.

Q. What do you have now? A. Five.

Q. Does that include the personnel that are hired to measure fields?

A. No, that is the office employees.

Q. In your head, do you have an approximate estimate of the cotton allotment prorated to Pinal County for the year 1958?

A. Approximately 147,000 acres. [32]

Q. Do you know whether that is more or less than 1957?

A. In 1957 it is slightly more. I don't know how much.

Q. I must have confused myself there. You mean 1957 is more?

A. No, 1957 is less than 1958.

Q. Do you know off-hand how this compares with 1956? A. No, sir.

Q. These records you have produced here today were produced as the result of subpoena by the Government, that is correct, isn't it? A. Yes, sir.

Q. Were these records at the time of the serving of the subpoena in your possession down there at the office in Casa Grande?

(Testimony of Tom C. Davis.)

A. A portion of them were.

Q. Do you know where the remainder were?

A. With Mr. Hays, the District Attorney's Office.

Q. Where did you keep your records down there in the office, in particular, these records?

A. You mean the geographic location of the office?

Q. Well, in what sort of a container, for instance?

A. Well, a portion of them would be in filing cabinets, such as the Listing sheets, or kept in large map cases.

Q. They were not kept in the safe, or segregated apart from the other records, were they? [33]

A. No.

Mr. Stanfield: I have no further questions at this time.

Mr. Holohan: We have no further questions of the witness. May he be excused permanently?

The Court: He may be as far as the Court is concerned.

Mr. Whitney: I may have to use him. I made the request.

Mr. Holohan: All right.

The Court: All right, you are not excused permanently.

(Witness excused temporarily.)

Mr. Holohan: The Government calls Mr. Mathis as its next witness. [34]

H. L. MATHIS

called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Mr. Holohan: May this be marked for identification as Government's Exhibit 11, and this be marked Government's Exhibit 12 for identification.

(Said Records were marked as Government's Exhibits 11 and 12, respectively, for identification.)

Direct Examination

Q. (By Mr. Holohan): Tell us your full name, please. A. H. L. Mathis.

Q. Where do you reside, Mr. Mathis?

A. I live at Bapchule, Arizona.

Q. What is your employment?

A. I am self-employed in the retail grocery business.

Q. That is a trading post out on the Reservation, isn't it? A. Yes, it is.

Q. Have you ever been employed by the Pinal County ASC office? A. Yes, sir, I was.

Q. When did you first go to work for them?

A. In May of 1955. [35]

Q. What was your job? A. I was a clerk.

Q. How long did you remain with the office?

A. I was there until September 1st of 1957.

Q. What positions did you hold throughout that period of '55 to '57?

A. I was Clerk until January, 1957, when I took over from Mr. Short as Office Manager.

(Testimony of H. L. Mathis.)

Q. Then in January, 1957, you became the Office Manager, and you held that post until when?

A. The 1st of September.

Q. Of 1957? A. Of 1957, yes.

Q. While you were the office manager in 1957, in January of that year were you subpoenaed to appear before the Grand Jury here in Phoenix and bring with you certain records from the office down there at Pinal County? A. I was, yes, sir.

Q. I will hand you what has been marked Government's Exhibit for identification number 11, and Government's Exhibit 12 for identification, and ask you to examine the exhibits, and were they the exhibits that you brought to the Grand Jury?

A. Yes, sir, they are.

Q. Were they records from the Pinal County ASC Office? [36] A. Yes, sir.

Q. Records kept in the regular course of governmental business there? A. Yes, sir.

Q. And as County Manager during that period you had custody and control of such records?

A. Yes, sir, I did.

Q. Specifically, without going into the actual documents, what is Government's Exhibit 11 for identification?

A. Well, the first sheet is a——

Q. Without going into those sheets, is there a general designation for the exhibit?

A. This is an old farm folder.

Q. For what farm? A. For Farm 647.

Q. That is "11"?

(Testimony of H. L. Mathis.)

A. That is Government's Exhibit 11, yes, sir.

Q. Now, Government's Exhibit 12 for identification, would you examine that and tell us generally what this is?

A. This is an ACP folder for Farm 647.

Q. Are you familiar with the document known as Form 578? A. Yes, sir.

Q. All right. What is 578?

A. It is a form that is used to record the measured acreage and the destroyed acreage on any farm within the county. [37]

Q. Are they forms provided by the regulations of the Department of Agriculture?

A. Yes, sir, they are.

Q. So in short, they are official forms?

A. Yes, sir.

Mr. Holohan: Will you mark these.

The Clerk: Government's Exhibits 11-A, 11-B, 11-C, and 11-D for identification.

(Said documents were marked Government's Exhibits 11-A, 11-B, 11-C, and 11-D, respectively, for identification.)

Q. (By Mr. Holohan): Now I will hand you three documents which I have withdrawn from Government's Exhibit 11 for identification, and ask you whether those documents, first of all, are examples of this form 578, that we are talking about?

A. Yes, sir, they are.

Mr. Whitney: You mean samples of it?

Q. (By Mr. Holohan): Now, I will hand you

(Testimony of H. L. Mathis.)

what has been marked Government's Exhibit 11-D, and ask you is that a 578 also?

A. Yes, sir, it is.

Q. Going to Government's Exhibit 11-A, for what farm is that a 578? A. Farm 647.

Q. Does it carry the operator's name on it? [38]

A. Yes, sir, it does.

Q. Who is the operator? A. Rex Neely.

Q. All right, now, calling your attention, then, to 11-B, to what farm does that apply?

A. That is the same farm 647.

Q. Who is the operator? A. Rex Neely.

Q. Is there a purported signature on it?

A. Yes, sir, there is.

Q. What is the purported signature?

A. The signature of committeeman or reporter is Joe L. Short, and the signature of the operator or representative is Rex L. Neely.

Q. Now, on Government's Exhibit 11-A, if I may go back to that a moment, for what year is that 578? A. This is for the year 1954.

Q. And for what crop? A. For cotton.

Q. Any particular type? A. Short staple.

Q. The same questions with regard to 11-B, what year does it cover? A. It covers 1955.

Q. And for what crop on 11-B? [39]

A. Short staple crop.

Q. Now, with regard to Government's Exhibit 11-C, is there a designation as to the farm?

A. Farm 647.

(Testimony of H. L. Mathis.)

Q. Is there any designation as to the name of the operator on there?

A. No, sir, there is not.

Q. Is there any purported signature on it?

A. Yes, sir, there is.

Q. What are they?

A. Signature of committeeman or reporter is Joe L. Short, and the signature of the farm operator or representative is Rex L. Neely.

Q. What crop?

A. This is Long Staple cotton.

Q. Finally, for Government's Exhibit 11-D for identification, what farm is that?

A. Farm 647.

Q. And the farm operator? A. Rex Neely.

Q. Purported signature?

A. The signature of farm operator is Rex L. Neely.

Q. And of the reporter or committeeman, no signature?

A. There is no signature there.

Q. What crop is covered? [40]

A. Short Staple cotton.

Mr. Whitney: That is 1956, isn't it?

Mr. Holohan: Yes. May this be marked Government's Exhibit 11-E for identification?

(Said document was marked Government's Exhibit 11-E for identification.)

Q. (By Mr. Holohan): Now, I will hand you what has been marked Government's Exhibit 11-E for identification, and what type of form is that?

(Testimony of H. L. Mathis.)

A. This is a Notice of Allotment.

Q. What do you mean by that?

A. Well, every operator receives a notice of this sort to tell them what their allotment for short staple and long staple cotton will be for that year.

Q. All right. To what farm does this apply?

A. Farm 647.

Q. And the operator? A. Is Rex Neely.

Q. And the address?

A. 699 North Washington, Chandler, Arizona.

Q. With regard to this document 11-E, how is that type of document prepared?

A. They are prepared from the listing sheets. Then they are presented to a member of the County Committee for signature and approval, and then they are mailed to the operators. [41]

Q. We have Government's Exhibit 11-E, which has come from the Farm Folder. Is there a copy of the original, or what is it that is sent to the farmer?

A. The original is sent to the farmer, and a copy is retained in the County Office files.

Q. What color is the original? Is it different from this Government's Exhibit?

A. It was white.

Q. White. Now I will hand you what has been marked Government's Exhibit 2 for identification, and ask you whether you recognize the document?

A. Yes, sir.

Q. And what is it?

(Testimony of H. L. Mathis.)

A. It is the listing sheets for Pinal County for the year 1955.

Q. For what crop there?

A. This is for the Short Staple cotton.

Q. All right. Now, on the listing sheets, was it required that there be an approval by the County Committee of the allotments set forth there?

A. Yes, sir.

Q. Does Government's Exhibit 2 bear such a section showing approval?

A. Yes, sir, it does.

Q. All right. And where is that? [42]

A. In Allotments Approved by County Committee.

Q. With purported signatures of——

A. Henry Haley and J. E. Beggs.

Q. During your course as an employee of that Committee, you worked with those Committeemen, and you are familiar with their writing?

A. Yes, sir.

Q. Now, calling your attention to one of the pages there, page 19, of the listing sheet there, is there an allotment set forth for Farm 647?

A. Yes, sir, there is.

Q. Now, within this same exhibit, Government's Exhibit 2 for identification, is there any with regard to Long Staple, and more especially, Farm 647?

A. Yes, sir.

Q. And where is that?

A. This is on a new farm supplement for 1955, for Long Staple.

(Testimony of H. L. Mathis.)

Q. And does that show the approval of the County Committee there?

A. Yes, sir, it does.

Q. And what are the signatures on that that you recognize?

A. Henry D. Haley, and R. B. Elsberry.

Q. And there is allotment for Extra Long Staple cotton designated for this Farm 647? [43]

A. Yes, sir, there is.

Mr. Holohan: At this time the Government offers in evidence Government's Exhibit 2 for identification as Government's Exhibit 2.

Mr. Whitney: No objection, as far as I am concerned.

Mr. Stanfield: No objection.

The Court: It may be received.

(Said document was received in evidence, and marked as Government's Exhibit 2.)

Q. (By Mr. Holohan): Now with regard to Government's Exhibit 3 for identification, do you recognize that document?

A. Yes, sir, this is the Listing Sheet for Pinal County for the 1956 year.

Q. All right. Do you find on the document here on Page 1 there for Short Staple Cotton the approval of the County Committee for the allotments for that year for Short Staple Cotton?

A. Yes, sir, I do.

Q. All right. And the signatures appear thereon that you recognize?

A. J. E. Beggs, and Henry D. Haley.

(Testimony of H. L. Mathis.)

Q. All right. Now, is there an allotment shown for Farm 647? A. Yes, sir, there is.

Q. And is there the operator's name stated there? [44] A. Yes, sir, it is.

Q. That is stated as—— A. Rex Neely.

Q. Where in the column here do we find the allotment?

A. The original approved farm allotment, column 21.

Q. Column 21 tells us what the allotment is, then? A. Yes.

Mr. Holohan: At this time the Government offers in evidence Government's Exhibit 3 for identification as Government's Exhibit 3.

Mr. Whitney: Defendant Neely has no objection.

Mr. Stanfield: No objection.

The Court: It may be received.

(Said document was received in evidence as Government's Exhibit 3.)

Q. (By Mr. Holohan): I will hand you what has been marked Government's Exhibit 11-E for identification, which you have identified as a Notice of Acreage Allotment for Upland cotton for the year 1956.

Do you recall who prepared that notice?

A. No, sir, I don't.

Q. Would you examine the date of the notice.

A. December first, 1956.

Q. Does that refresh your recollection as to anything?

A. No, sir, I am afraid it doesn't. [45]

(Testimony of H. L. Mathis.)

Mr. Holohan: May this be marked as Government's Exhibit 11-F for identification.

(Said document was marked as Government's Exhibit 11-F for identification.)

Q. (By Mr. Holohan): Now, I hand you Government's Exhibit 11-F for identification, a document taken from the folder of Government's Exhibit 11 for identification. And I will hand you Government's Exhibit 11-D for identification, and I will ask you to examine those documents.

Now, with regard to Government's Exhibit 11-F, first of all, what is that?

A. This is a Notice of Farm Acreage Allotment, Farm 647.

Q. All right. And for what crop year?

A. For 1956.

Q. All right, now as for Farm 647, the operator is designated thereon as? A. Rex Neely.

Q. Now, look at Government's Exhibit 11-E for identification. And that is a notice of allotment for what year, what crop year?

A. For crop year 1956.

Q. With those documents in your hand, does that refresh your recollection as to who prepared Government's Exhibit 11-E? A. No, sir.

Q. All right. In the year 1956 did you ever receive any [46] instructions from the Defendant Short with regard to preparation of a Notice of Allotment for Farm 647?

A. Not that I recall.

(Testimony of H. L. Mathis.)

Mr. Holohan: May these documents be marked in sequence for identification, starting with 12-A.

Q. (By Mr. Holohan): Did you know the Defendant Short from your work there at the ASC Committee Office in the years 1955 and 1956?

A. Yes, sir, I did.

Q. What position did he hold while you were there?

A. He was the Pinal County Office Manager.

Q. Do you know what position he held before you came there, if any?

A. No, sir, I don't.

Q. Did you ever have a conversation in 1956 with the Defendant with regard to the 578, Form 578 of the Defendant Neely?

A. Only one time that I can recall.

Mr. Whitney: What was that answer?

The Witness: One time that I can recall.

Q. (By Mr. Holohan): Where did the conversation take place, sir?

A. It was not a conversation. Mr. Short had suffered a stroke, and he was in the hospital.

Q. And who was present, as best you recall?

A. I don't believe anybody was present but Mr. Short and myself.

Q. And do you recall when this was?

A. Oh, I would say sometime the latter part of the year, September, October.

Q. Of what year? A. Of 1956.

Q. And what was your query to Mr. Short?

A. I went down to find out if Mr. Short knew,

(Testimony of H. L. Mathis.)

or if he had any information concerning the 578 on Mr. Neely's farm, and I asked him if Rex was all right, and he indicated that he was.

Q. All right. At the time that you went to see the Defendant in the hospital on this occasion, did you know where the 578 was for this Neely farm 647? A. Yes, sir, we had located the 578.

Q. You had located it? A. Yes.

Q. Where was it located?

A. It was in Mr. Short's desk in his office.

Q. It was not in the regular Farm Folder?

A. No, sir, it was not.

Q. Is Government's Exhibit 11-D that document? A. Yes, sir.

Q. That is the 578 that you located? [48]

A. Yes, sir.

Q. Now, you had looked over this 578 before you went to see the Defendant? A. Yes, sir.

Q. And he indicated to you that Neely was all right? A. Yes, sir.

Q. Now, thereafter, did the Defendant Neely come to the office to secure his marketing card?

A. Yes, sir, sometime after. I don't remember when.

Q. And was he issued a marketing card?

A. Yes, sir, he was.

Q. I will hand you what has been marked Government's Exhibit 7 for identification, and ask you whether you recognize the document?

A. Yes, sir.

Q. What is it?

(Testimony of H. L. Mathis.)

A. It is a form MQ-90, a Marketing Card Register for the year 1956.

Q. Is there an entry for Farm 647 showing the issuance of a Marketing Card?

A. Yes, sir, there is.

Q. Does it show by whom the Marketing Card was issued? A. No, sir, it doesn't.

Q. Do you recognize the writing?

A. No, not off-hand, I don't. [49]

Q. Is the entry also dated? A. Yes, sir.

Q. All right.

A. October. October the third, 1956.

Q. All right. At a subsequent date, after the issuance of the Marketing Card, did you go to the farm operation of the Defendant Neely?

A. Yes, sir, I did.

Q. Were you accompanied by anyone?

A. Yes, sir, Mr. Ray Wolfe.

Q. Did you take any action with regard to the Defendant's farm operation there?

A. We measured his cotton, or his stalks, I should say.

Q. All right, during the course of measurement did you come in contact with anyone there at the farm?

A. We saw Mr. Neely when we first drove up to obtain his permission to measure his farm.

Q. Did you have a conversation with him?

A. Very little.

Q. All right. Who was present at that time?

A. Mr. Wolfe and myself, and Mr. Neely.

(Testimony of H. L. Mathis.)

Q. And about when was this?

A. I would say in the latter part of November.

Mr. Whitney: Of what?

The Witness: Of November. [50]

Q. (By Mr. Holohan): Of what year?

A. 1956.

Q. What did you or Mr. Wolfe say to Neely?

A. Mr. Wolfe, I believe, carried the conversation. He asked Mr. Neely if he had any objections to his measuring his farm, that our instructions from the State Office were to obtain figures on the cotton that he had planted, and which Mr. Neely gave us permission to measure his farm.

Q. All right, was anything else said then?

A. Not at that time. I believe later that day Mr. Neely came by and indicated to us that he had a lease on it to Mr. Short.

Q. What did he say, as best you can recall?

A. Just to the effect that he had a lease.

Q. Who was present at this conversation, now?

A. Sir?

Q. Who was present at this conversation?

A. Mr. Neely, myself, and Mr. Wolfe. I forgot where I was. Mr. Neely indicated that he had a lease on another farm, and I think he asked Mr. Wolfe if we had taken that into account on our measurements, and I don't recall what the answer was. And we left shortly after that with our computations.

Q. Did you ever tell him what the results of your computations were? [51]

(Testimony of H. L. Mathis.)

A. No, sir, I did not.

Q. You say you did not, or you don't recall.

A. Well, I will say I don't recall.

Q. At this time I will hand you several documents withdrawn from Government's Exhibit 12 for identification, and these exhibits are marked 12-A through 12-F.

I will ask you to look them over, please. Have you had an opportunity to do that?

A. Yes, sir.

Q. What is 12-A for identification?

A. It is Form ACP-201, or Request that the Government Share Costs of Conservation Practice on this farm.

Q. What does ACP stand for?

A. Agricultural Conservation Program.

Q. Without going into elaborate detail, what is that?

A. It is a request submitted to the County Committee by Mr. Neely for leveling on 160 acres, and ditch lining of 150 cubic yards.

Q. Generally, without reference to the document, what is this ACP program.

A. What is the ACP program?

Q. Yes.

A. It is a program that the Government instituted for the Federal Government to share costs of needed conservation, such as land leveling, concrete ditches, or any improvement to the farm. [52]

Q. Such things as saving water generally?

A. Yes, sir.

(Testimony of H. L. Mathis.)

Q. Assisting in making land fertile?

A. Fertile. Yes.

Q. All right, 12-A is a Request for such practice?
A. Yes, sir.

Q. What is 12-B?

A. 12-B is ACP Form 247, which is prepared after 201 is approved by the County Committee.

Q. Before we get too far on 12-A, do we have a purported signature of the operator?

A. Yes, sir, we do.

Q. What is that? A. Rex L. Neely.

Q. And do we have a purported signature of a Committeeman approving it?

A. Yes, sir, we do. R. B. Elsberry.

Q. Going from 12-A, which is 201 you described, to 12-B for identification.

A. This is ACP Form 247, which is a practice that is, if tentatively approved by the County Committee, submitted to the Soil Conservation Service.

Q. How does the Soil Conservation Service get into this?

A. Any job like land leveling, or concrete ditches [53] come under the supervision of the Soil Conservation Service to make sure that the practice is installed and maintained by good government practices.

Q. And with regard to this 12-B for identification, what are the two categories that are carried on the form?

A. There is a Statement of Need, and a Report of Performance.

(Testimony of H. L. Mathis.)

Q. Now, 12-B for identification, that covers which of those categories?

A. This covers the needs.

Q. Then does it describe the item that is to be done, the practice to be followed?

A. Yes, sir, in this case it is land leveling.

Q. Now, what is 12-C for identification?

A. 12-C is Form ACP-245, or copy of it, to show the extent performed, and the amount of money that is earned by performance of this practice.

Q. All right. Does that bear a signature?

A. Yes, sir. It is approved by Joe L. Short.

Q. You are familiar with Mr. Short's signature from your experience there?

A. Yes, sir.

Q. And is that his signature?

A. Yes, sir, I would say it is.

Q. Now, with regard to the next document, [54] which is 12-D for identification, what is that document?

A. This again is a copy of the ACP Form 247, a statement of Need, and a Report of Performance, and in this case it is for concrete ditch lining.

Q. Does it have a purported signature on it?

A. Yes, sir. Donald F. Rankin. Rankin?

Q. Are you having some difficulty deciphering it?

A. Well, I assume this last name is Rankin. I don't know what the first name is.

Q. All right. Now, the next document is Government's Exhibit 12-E for identification. What is that?

(Testimony of H. L. Mathis.)

A. This is another copy of the Form 247, with the Report of Performance on this form.

Q. On 12-D for identification, which you have identified previously, which of the categories does it deal with?

A. This deals with the needs of this particular farm for concrete ditch lining.

Q. And what is 12-E dealing with, then?

A. This is the actual report of performance, or what was done on this farm.

Q. Now, finally we have 12-F. What is that?

A. This is the final form of ACP-245, or the form that the computation is computed on, and the money is paid from ACP to this farm.

Q. What farm is this covering? [55]

A. This is Farm 647.

Q. Does it bear a purported signature?

A. Yes, sir, it does.

Q. What signature? A. Rex L. Neely.

Q. All right. And it deals with what farm?

A. Farm 647.

Q. Now, the County Office itself does not pay for these agricultural practices, does it?

A. No, sir, they do not.

Q. How is payment secured?

A. We transmit a block of 245's, or a payment statement as they become due, and they are mailed from San Francisco, the checks are mailed from San Francisco.

Q. One of the disbursing offices, then?

A. One of the disbursing offices, yes.

(Testimony of H. L. Mathis.)

Q. I will hand you what has been marked Government's Exhibit 10 for identification, and call your attention to the first group of three documents as part of that. A. Yes, sir.

Q. What are those documents?

A. These are forms ACP-210 and 212, which are transmittal sheets that we use to report the amount of payment due to these producers.

Q. And these are transmitted to this disbursing person who eventually pays it? [56]

A. Yes, sir.

Q. And as part of those vouchered for payment, is there anything with regard to this Farm 647?

A. Yes, sir, there is. There is an entry for Farm 647, Rex L. Neely, 699 North Washington Street, Chandler, for \$1500.

Q. Thank you. I might ask you one more item on Government's Exhibit 10. These numerals which are down here at the very bottom of the third page on this exhibit, Government's Exhibit 10 for identification, what are those?

A. Those are the numbers on the checks that are issued.

Q. And from what source do you get those?

A. They are on this transmittal form when they are returned to us.

Q. So the disbursing officer then puts those on?

A. Yes, sir.

Q. And sends you back a form showing a payment of this amount? A. Yes, sir.

Mr. Holohan: At this time the Government of-

(Testimony of H. L. Mathis.)

fers in evidence Government's Exhibit 10 for identification as Government's Exhibit 10.

Mr. Stanfield: No objection.

Mr. Holohan: As I understand it you have no objection? [57]

Mr. Whitney: No, we have no objection. They are Government records.

The Court: It may be received.

(Said documents were received in evidence and marked as Government's Exhibit 10.)

Mr. Holohan: You may cross examine the witness.

Cross Examination

Q. (By Mr. Stanfield): Mr. Mathis, you stated earlier, I believe, that you started your employment with the Pinal County ASC Office in May of 1955, is that right? A. That is right.

Q. And you left their employ in September, no, in January of 1957, is that correct?

A. No, September 1st, 1957.

Q. September, 1957. May I ask how you happened to end your employment? A. I quit.

Q. Bear with me just one minute.

I asked Mr. Davis, the current Office Manager, some questions a few minutes ago about the programs that were handled by the office, and he wasn't informed on the 1954, 1955, and '56. [58]

You are familiar with what the programs for 1955 and 1956 were, and I suppose in 1957?

A. Yes, sir.

Q. Would you tell us what those various pro-

(Testimony of H. L. Mathis.)

grams that were handled by the ASC Office were in those years?

A. There was the Commodity Credit Loan Program, Administrative Program, the Cotton Program, the Wool Program, ACP Program, and Emergency Feed Program.

Q. When you became Office Manager in January, 1957, you were placed in charge of all these programs directly, weren't you? A. Yes, sir.

Q. And, in fact, the main responsibility for the entire operation of the office of the various programs falls upon the office manager, which was you at that time?

A. Yes, sir, that is right.

Q. And you had occasion during that period of time to prepare a budget for the office for the fiscal year in which it was coming up, did you not?

A. Yes, sir, I did.

Q. Do you have any recollection of what that budget figure was?

A. Somewhere around 43,000, I believe it was.

Q. You had about four regular employees then, did you? A. Yes, sir, four. [59]

Q. And from this \$43,000, you were required to pay your own salary, and the salaries of the other people that worked in the office, office rent and utilities, and whatnot, and the various sundry allowances to the Committeemen, that all came out of that figure? A. Yes, sir.

Q. Did you have occasion to examine the status

(Testimony of H. L. Mathis.)

of the various accounts at the office when you took over as Office Manager?

A. You mean the various programs?

Q. Yes.

A. Yes, sir. They were gone over by the State Office Auditing Department on the 1st of January.

Q. And were you informed as to their condition, or did you subsequently learn it?

A. Yes, sir, I was forwarded a letter after the audit was made.

Q. And what was the condition of these programs?

A. Well, all programs were in good shape except the Cotton Program. There was some exceptions to the Cotton Program in 1956, the latter part of 1956.

Q. Do you know if that was in connection with these proceedings, or something else?

A. I don't know.

Q. You were there as a clerk, I believe, between May of [60] 1955, and January of 1957, when Mr. Short was the Office Manager, isn't that right?

A. Yes, sir, that is right.

Q. And he handled all of these programs during that period of time, did he not, the wool, and so forth?

A. He was responsible for all the programs.

Q. And the cotton allotments program was actually reinstated from the condition in 1950, beginning in 1953, and it was in full sway when you were there in 1955, that is correct, isn't it?

(Testimony of H. L. Mathis.)

A. Yes, sir.

Q. You had considerable experience with the cotton allotment program yourself as Manager, did you not? A. Yes, sir, I did.

Q. As to the effect. What was your experience with the program?

A. I don't quite follow you.

Q. Let me ask you this question. You said earlier that you quit your employment of September of 1957? A. Yes, sir.

Q. Was the reason for your leaving there related to the program there, and the office conditions? A. Partly, yes, sir.

Q. Describe what that part of that situation was that affected your terminating your employment.

Mr. Holohan: I object to that as being immaterial.

The Court: Sustained. We will have our afternoon recess. Keep in mind the Court's admonition.

(Recess.)

The Court: You may continue.

Q. (By Mr. Stanfield): Mr. Mathis, calling your attention again to September of 1956, you stated earlier that you had gone out to the hospital to see Mr. Short, that is correct, isn't it?

A. Yes, sir.

Q. When you arrived there at the hospital, you found Mr. Short in a sort of a paralytic condition, did you not? A. Yes, I did.

Q. And, as a matter of fact, his ability to speak

(Testimony of H. L. Mathis.)

was so impaired that you couldn't understand him, isn't that correct?

A. At the time I was there, Mr. Short couldn't speak at all.

Q. And when you were there, isn't it possible you were mistaken before, and that his wife was there with him at that time when you had this conversation? A. It could very possibly be.

Q. And isn't it a fact that you knew, or that you did know that at the time he was struck down with this illness, he had been out checking some farms that he knew were overplanted? [62]

A. No, sir, I don't know what Mr. Short was doing. It happened on a week-end.

Q. Isn't it a fact that when you were there at the hospital, that one way or the other he inquired of you as to whether or not everyone was okay, and had plowed up their cotton, the ones that were overplanted?

A. That I can't remember that far back. I know our interview was very short.

Q. In other words, it is possible because of your failure to recall clearly, that rather than your inquiring of him, he actually inquired of you, since you were about to issue the Soil Bank checks and the Marketing Cards, that that might have been the way it was?

A. It could very easily be. I know there was two specific cases I went out to check with Mr. Short on.

Q. The point being here he inquired of you if

(Testimony of H. L. Mathis.)

they were in compliance at that time, is that not correct?

A. Like I say, that could probably be.

Q. You stated earlier that you had located a Form 578 for the year 1956 for Mr. Neely in Mr. Short's desk, in the office?

A. Yes, sir.

Q. Rather than in its folder?

A. That is right.

Q. As a matter of fact, this was only one of a number of [63] 578 forms that were in Mr. Short's desk?

A. There were other 578's in the desk, yes.

Q. And there was nothing unusual at all about the 578 form being in his desk?

A. Nothing unusual about it, no, sir.

Mr. Stanfield: I would like to ask this witness some questions later on. But that is all at this time.

Cross Examination

Q. (By Mr. Whitney): Mr. Mathis, referring to the Government's Exhibit 11-D for identification, this is headed Report of 1956 Acreage of Farm Number 647?

A. Yes, sir.

Q. Now, when did you first see that?

A. I don't recall the exact date. It was some-time in the fall of 1956.

Q. And do you remember, or do you know whose handwriting that is?

A. No, sir, I don't.

Q. Would you turn to the back. Do you know that either?

(Testimony of H. L. Mathis.)

A. Well, the signature of the computer is Dorothy Pryor.

Q. And that is some lady that worked there in the office?

A. Yes, sir, she was an employee of the office.

Q. Either a clerk or a stenographer? [64]

A. Well, she was hired strictly for the computation of cotton for the summer.

Q. And you believed that she made out this Government's Exhibit 11-D for identification?

A. She signed it.

Q. I see. Where is her signature up there, Dorothy Pryor? A. In the left-hand column.

Q. Do you know whether those are her figures or not? I assume it is?

A. I would assume it is, yes, sir.

Q. She is the one that computed the acreage?

A. Yes, sir, I would say so.

Q. Now, where did you first see this?

A. It was in Mr. Short's desk drawer.

Q. Along with, as you stated to Mr. Stanfield, along with a lot of other 578's? A. Yes, sir.

Q. Involving other farms than 647?

A. Yes, sir.

Q. When you got that, were all those figures on there? A. Yes, sir.

Q. They were all on?

A. They were all on there, yes, sir. [65]

Q. You say that signature there, R. L. Neely, 10/3/56, that would be October 3rd, 1956, did you see Mr. Neely sign that?

(Testimony of H. L. Mathis.)

A. No, sir, I did not.

Q. Do you know, or have you any way of telling who issued Mr. Neely the marketing card for the 1956 cotton? A. No, sir.

Q. Well, this document here shows Final Acres 477.7. That means the final acres in cotton?

A. Yes, sir.

Q. And do you know what his allotment was that year? A. Not off hand.

Q. Well, what would you have to look at in these documents to determine that?

A. Well, the listing sheet would be the one.

Q. (Handing document to witness.) The Listing Sheet is Government's Exhibit 3 admitted in evidence, the 1956 official Listing Sheet. Tell me what his allotment was, please.

A. It was 306.7 acres.

Q. 306.7. Okay. Referring to Government's Exhibit 10-E and 10-F, that was for the 1956 Notice of Farm Acreage Allotment.

Mr. Holohan: Mr. Whitney, is that 10 or 11?

Mr. Whitney: This is 11-F, I think it is.

Mr. Holohan: Yes. [66]

Mr. Whitney: I beg your pardon.

Q. (By Mr. Whitney): That shows 306.7?

A. Yes, sir.

Q. Signed by Mr. J. E. Beggs?

A. Yes, sir.

Q. Who was Mr. Beggs?

A. He was chairman of the Pinal County Committee that year.

(Testimony of H. L. Mathis.)

Q. That is dated December 1st, it says 1955, doesn't it? A. Yes, sir.

Q. But that was really for the 1956 cotton?

A. Yes, sir, for the 1956 year.

Q. All right, turning to Government's Exhibit 11-E for identification, that also shows an allotment of 367.7 acres? A. Yes, sir.

Q. And that is signed by Mr. Henry D. Haley?

A. Yes, sir.

Q. December 1st, 1956? A. Yes, sir.

Q. Who was Mr. Haley?

A. He was a member of the Pinal County Committee in that year.

Q. Again referring to Government's Exhibit 11-D for identification, do you remember—I will withdraw that. That I notice is not signed by anyone? [67] A. No, sir.

Q. That should be signed by whom?

A. The signature of the man who measured the farm originally should be entered here.

Q. Do you know what that "X" is down there for, or is that probably for his signature?

A. I have no idea.

Q. You wouldn't know. And you don't know who issued the Marketing Card?

A. No, sir, I don't.

Mr. Whitney: I ask the Government to produce the marketing card for 1956 on Long Staple.

Mr. Hays: On Long Staple or Short?

Mr. Whitney: I mean on Short Staple. I beg your pardon.

(Testimony of H. L. Mathis.)

Would you mark this for identification, please. This is the card I presume that the Government Agent picked up from Mr. Neely.

Mr. Hays: That is correct.

The Clerk: Defendant's Exhibit E for identification.

(Said card was marked for identification as Defendant's Exhibit E.)

Q. (By Mr. Whitney): Referring to Defendant's Exhibit E for identification, I will ask you if that doesn't refresh your memory about the Marketing Card for 1956, Upland Cotton, or rather [68] Short Staple?

A. Yes, sir, the card was issued by Pauline Golsten.

Q. Is that your signature or hers?

A. No, my signature was written in by Mrs. Golsten.

Q. She had authority to do that, I assume?

A. Yes, sir, she did.

Q. And it is also signed by Mr. Neely here?

A. Yes, sir.

Q. Would you explain to me why, if he only had an allotment of 306.7, or 367 as one of those says, and this shows he had planted cotton of 477.7 there on the same day that this 11-D, Government's Exhibit 11-D was signed, that this would issue, showing him eligible for CCC Loan?

A. Mrs. Golsten came to my office and informed me Mr. Neely was in, and would like to pick up

(Testimony of H. L. Mathis.)

his card. And his 578 still showed there was no destroyed cotton, and what should she do.

I told her due to my conversation with Mr. Short, that I was under the impression that Mr. Neely was all right, and for her to go ahead and issue the card.

Q. Go ahead and issue the card?

A. Yes, sir.

Q. And that has been done in many instances, down there, hasn't it, other than Mr. Neely?

A. You mean where? [69]

Q. Where there has been overplanting and no destruction of cotton, where they have gotten a Marketing Card, other farmers?

A. It was done in some other cases, yes, sir.

Q. Now, Mr. Mathis, what did you call, or what is being called down there, or was called the Control Register, if you know?

A. The Control Register?

Q. Yes.

A. It is a sheet that we made up at the first of the year to show the farm number, the man's allotment, the date that the various notices of overplant were sent out, the amount of destruction on the farm, and the date that the compliance notice was sent out.

Q. Do you know whether or not Mr. Neely ever received a notice of overplant?

A. No, sir, I don't know.

Q. Could you tell from the Control Register whether he did or not?

A. Probably.

(Testimony of H. L. Mathis.)

Q. Take 1956.

A. No, sir. According to this, he was never notified.

Q. Never notified. Was he ever notified, according to the records, or according to your knowledge, of the amount of overplant and penalty due the Government? [70]

A. To my knowledge, no, sir.

Q. Do you know, Mr. Mathis, whether the penalties were ever figured up on the 1956 overplant?

A. Yes, sir, they were.

Q. By whom?

A. Mr. Wolfe and myself figured them.

Q. Were they ever sent to Mr. Neely?

A. No, sir, they were not.

Q. And that would be the amount of the overplant, plus about—what did they tax, 17 cents a pound?

A. 17½ cents a pound in that year.

Q. That was never sent to Mr. Neely after it was made up? A. No, sir.

Q. Why wasn't it sent to him?

A. My instructions came from the State Office to hold it up on the mailing.

Q. Hold it up? A. Yes, sir.

Q. In other words, did Mr. Neely ever ask you about the penalty?

A. Mr. Neely called me one day at the office, and the only thing I could tell him was that the notice was being held up.

Q. That the notice was being held up?

(Testimony of H. L. Mathis.)

A. Yes, sir. [71]

Q. He indicated he would have paid the penalty?
A. We didn't get into it that far.

Q. You just told him the notice was not going to be sent out?
A. Yes, sir.

Q. Do you know of other cases in the records you have identified there where there has been overplant by other farmers?

A. Well, in 1956 probably 85 percent of the farmers in the county overplanted their original allotments.

Q. And many of them didn't destroy their cotton, the excess?

A. You mean did they pay the penalty, or—you lost me there.

Q. Or destroy it?

A. They would have to do one of the two.

Q. Were some of them issued Marketing Cards?

A. Well,—

Q. Without either paying the penalty, or showing them eligible for the loan?
A. Yes, sir.

Q. How many do you know of in that county?

A. I know of two.

Q. Do you remember who they were?

A. Yes, sir, Mr. Beggs, and Mr. Haley. [72]

Q. Who was Mr. Beggs?

A. He was Chairman of the Pinal County Committee in this particular year.

Q. Who is Mr. Haley?

A. He was a member of the County Committee.

Q. They both were in that situation?

(Testimony of H. L. Mathis.)

A. Yes, sir.

Q. So it was common practice down there to overplant? A. Yes, sir.

Q. With reference to this control register, or what you have in your hand there, what they call the Control Register, which I will identify as Defendant's Exhibits A and B for identification, if I can find the A.

That came off. A and B for identification. What were they used for?

A. They were a record that we kept for our own use in the office, to show the status in the county, how many farms had been measured, how many farms had been plowed up and were in compliance, and how many were to be in compliance.

Q. It was not an official record, but something you used? A. That is right.

Q. It was in use before you got there?

A. Yes, sir.

Q. I see. You know of a farm 595?

A. Yes, sir. [73]

Q. How long has that been on the books?

A. 595?

Q. Yes.

A. I don't know. It was on the books in 1955.

Q. Was it on the books before then?

A. I don't know.

Q. You don't know as a fact, then, that it might have been on the books since 1950?

A. Well, it wouldn't have been on the books. There was no allotments in 1951, '52, and '53.

(Testimony of H. L. Mathis.)

Q. Were you connected with the Agricultural Stabilization and Conservation Committee in Pinal County on October 11, 1957? A. Of 1957?

Q. Yes. A. No, sir.

Q. When did you leave there?

A. September first, 1957.

Q. You are acquainted with the forms MQ-98 and MQ-92 (handing items to witness)?

A. MQ-92, yes, sir.

Q. What was the purpose of sending those forms out?

A. These forms are used to determine the normal yield, or the normal production for a farmer that has overplanted, in the process of paying his penalty, so that a penalty can be assessed. [74]

Q. Are you acquainted with the signature of Mr. Rodney Ellsberry? A. Yes, sir.

Q. Chairman of the Committee?

A. Yes, sir.

Q. Was he Chairman when you were down there? A. He was in 1957, yes, sir.

Q. Is that his signature? A. Yes, sir.

Mr. Whitney: I would like to have this marked as one exhibit, please.

The Clerk: Defendant's Exhibit F for identification.

(Said letter was marked as Defendant's Exhibit F for identification.)

Q. (By Mr. Whitney): This letter dated October 11, 1957, from Mr. Ellsberry to Mr. Neely, with these forms attached, appear to be what we have

(Testimony of H. L. Mathis.)

been discussing, that is to say Form MQ-98, and MQ-92, I believe.

That is Mr. Ellsberry's letter?

A. Yes.

Q. Defendant's Exhibit F for identification?

A. Yes.

Mr. Whitney: I think that is all. [75]

Redirect Examination

Q. (By Mr. Holohan): Counsel has made reference to a farmer overplanting his allotment.

Is this anything unusual or even contrary to the regulations at the beginning of the season to overplant your allotment?

A. No, sir, it is not.

Q. After the crop has grown to a suitable size, what takes place at the direction of the County Committee with regard to measurement of the farms?

A. Well, a crew is sent out to measure the various fields of cotton, and report the amount of acreage that is found on each individual farm in the County, and then if the man is overplanted, a notice of overplant is mailed to him, or if he is underplanted, or within his allotment, a notice of compliance is sent to him.

Q. Now, were any entries made on the 578 to reflect the conclusions on the measurements?

A. On the original measurement, yes, sir.

Q. On the original measurements, that would be

(Testimony of H. L. Mathis.)

the actual physical measurement of the farmer's allotted crop? A. Yes, sir.

Q. For instance, on Government's Exhibit 11-D, which you have identified as the 578 for Short Staple Cotton, for [76] Farm 647, for the year 1956, does it show that the farm was actually measured, and the results of such measurement?

A. Yes, sir.

Q. All right. On the reverse side of this, the actual computations that are made by someone, presumably, according to the document, Dorothy Pryor? A. Yes, sir.

Q. Now, in the Column G, Final Acres, is that then the final result?

A. Yes, sir. That is after the deductions, or——

Q. What is——

A. I was just going into the deductions.

Q. Excuse me. Go ahead.

A. If it is 4-4, or plant 4 and skip 12, whatever it would be, this would reflect the final acreage after it was computed.

Q. What does 4-4 mean?

A. It means plant 4, then 4 rows of idle, 4 rows cotton, 4 rows idle land.

Q. So-called skip-row planting, which the farmers have developed, a farm practice there for increase in additional yield? A. Yes, sir.

Q. Now, when a farmer plants a 4-4, then he is not charged with the gross acreage, then? [77]

A. No, he is charged with actual cut.

(Testimony of H. L. Mathis.)

Q. Then you have on the document in this case an example of 4-4 plant? A. Yes, sir.

Q. The gross measurements would be 73 acres?

A. That is right.

Q. Then it was a 4-4 plant, so there is an adjustment for that? A. Yes.

Q. It is approximately half, isn't it?

A. It is half.

Q. Is there another example of 4-4 plant?

A. Yes, sir.

Q. And another field designated there?

A. Yes, sir.

Q. This information is placed on the 578?

A. Yes, sir.

Q. Which we have referred to as Government's Exhibit 11-D for identification.

Thereafter this document is also, if there is showing a planting in excess of allotment, it is also according to the regulations supposed to show, to show the destruction, is it not? A. Yes, sir.

Q. If it doesn't show the destruction, then there [78] are other steps taken with respect to assessment of penalties, and so forth? A. Yes, sir.

Q. Now, in the instances that counsel spoke of where the two that you have knowledge of, in the case of Mr. Beggs and Mr. Haley having gotten their Marketing Card when they were overplanted, in the case of Mr. Beggs, from your knowledge and recollection, his 578 showed actual destroyed acreage to bring him into compliance, did it not?

A. Yes, sir, I believe it did.

(Testimony of H. L. Mathis.)

Q. Now, on your control register here, could this be described as really a type of work sheet?

A. Yes, sir, it could.

Q. There are instances when the so-called Control Register was not kept up to date, isn't that correct?

A. Yes, sir.

Q. It was not required by any regulations issued by the Department of Agriculture?

A. No, sir.

Q. It was solely an office practice?

A. That is right.

Q. Was that instituted by the Defendant Short, or do you know?

A. I don't really know.

Q. When you arrived on the scene, they were keeping some [79] sort of a work sheet here, this Control Register?

A. Yes, sir.

Q. Prior to your visit to the Defendant in the hospital on this occasion that you have previously testified to, as I understand your answer to one of the counsel for the Defendant's questions, you had two specific cases in mind.

What were the two specific cases?

A. One was Mr. Haley, and one was Mr. Neely's case.

Q. You had discovered the 578 here which you have identified as Government's Exhibit D?

A. Yes, sir.

Q. And then this inquiry was made by you of the Defendant Short?

A. Yes, sir.

Q. Prior to issuing a Marketing Card to the

(Testimony of H. L. Mathis.)

Defendant Neely you were contacted by Miss Golsten?
A. That is right.

Q. With regard to Government's Exhibit 7 for identification, which you have identified as the Marketing Card Register, would you turn to the entry with regard to 647, the Farm 647?

Now, have you found that entry here?

A. Yes.

Q. All right. In addition to the Farm No. 647, is there any designation of the Marketing Card Number?

A. Yes, sir, there is. Do you want the number?

Q. I will hand you Government's Exhibit [80] E for identification, and would you compare those?

Mr. Whitney: You mean Defendant's Exhibit E.

Mr. Holohan: Excuse me. Defendant's Exhibit E for identification.

Q. (By Mr. Holohan): Is it the same number as the Marketing Card Register shows being issued?

A. Yes, sir, it is.

Q. The actual writing on Government's Exhibit, or Defendant's Exhibit E was by Mrs. Golsten?

A. Yes, sir.

Mr. Holohan: At this time, we will offer the Marketing Card Register, Government's Exhibit 7 for identification, in evidence as Government's Exhibit 7.

Mr. Stanfield: No objection.

Mr. Whitney: No objection.

The Court: It may be received.

The Clerk: Government's Exhibit 7 in evidence.

(Testimony of H. L. Mathis.)

(Said Marketing Card Register was received in evidence and marked as Government's Exhibit 7.)

Q. (By Mr. Holohan): Now, with regard to Government's Exhibits E and F, or Defendant's Exhibits E and F, I believe they are exhibits you hold in your hand, are they not?

A. Yes, sir.

Q. Having gone over this matter with Mr. Whitney, and [81] seen these other documents, does that now refresh your memory as to who prepared the notice which is marked Government's Exhibit 11-E, I believe?

A. This 11-E was prepared by myself.

Q. You prepared Government's Exhibit 11-E?

A. Yes, sir.

Q. And why did you prepare it?

A. Prepared it on Mr. Short's instructions.

Q. That is the Defendant Short here?

A. Yes, sir.

Q. All right.

A. The circumstances, I don't know. He asked me to prepare this notice. He had it. It was signed by Mr. Haley. I typed it up and placed it in the man's Farm Folder.

Q. Did Mr. Haley sign it after it was typed up, or before? A. It was signed before.

Q. Was that not uncommon for the County Committeemen to sign certain documents in blank for action by the office down there?

A. No, sir. It was done.

(Testimony of H. L. Mathis.)

Q. It was done?

A. To speed the operation.

Q. In this particular instance, Government's Exhibit 11-E for identification was such an instance? The Committeeman Henry B. Haley had signed it in blank, and you were directed then by [82] the Defendant Short to prepare the document?

A. Yes, sir, that is correct.

Q. From what source did you get the figure for the allotment?

A. Mr. Short gave me the figure of 367.7.

Q. And it was dated as of December 1st, 1956?

A. Yes, sir.

Q. Is that about the date that you prepared it?

A. No.

Q. When did you prepare it?

A. I would say it was prepared sometime in November.

Q. Of what year? A. Of 1956.

Mr. Holohan: At this time the Government offers in evidence Government's Exhibit 11-E for identification as Government's Exhibit 11-E.

Mr. Whitney: Is that the one that shows——

Mr. Holohan: That is the one that shows this figure. (Handing to counsel.)

Mr. Whitney: No objection to 11-E.

Mr. Holohan: We will also offer in evidence Government's Exhibit 11-F for identification as Government's Exhibit 11-F.

Mr. Whitney: No objection to 11-F as far as Mr. Neely is concerned. [83]

(Testimony of H. L. Mathis.)

Mr. Stanfield: No objection to 11-E.

The Court: It may be received.

Mr. Stanfield: No objection to 11-F.

Mr. Holohan: May 11-F be received?

The Court: It may be.

The Clerk: Government's Exhibits 11-E and 11-F in evidence.

(Said documents were received in evidence and marked as Government's Exhibits 11-E and 11-F.)

Q. (By Mr. Holohan): Government's Exhibit 11-F in evidence is the original Allotment Notice dated December 1st, 1955? A. Yes, sir.

Q. That is for the crop year 1956?

A. That is right.

Q. And this 11-E was the one you were directed to issue later on? A. Later on, yes, sir.

Q. This was issued, as you recall, sometime in December, 1956?

A. November, sometime in November.

Q. Or November. What happened to the white sheet that is part of 11-E?

A. That I don't know.

Q. You did not cause it to be mailed out? [84]

A. No, sir, I don't think so.

Q. Now, at the time that you found these 578's in the Defendant's drawer, I take it that is the drawer down there at the office, his regular desk drawer down at the Pinal County Office?

A. Yes, sir.

(Testimony of H. L. Mathis.)

Q. Besides Government's Exhibit 11-D, how many other 578's were there?

A. I don't recall off-hand. There were maybe a dozen.

Q. About 12? A. I would say.

Q. All right. And roughly how many farms do you cover by the office down there in the cotton program?

A. Somewhere around 900 to 1000.

Q. Normally these 578's are part of the Farm Folder which you have identified earlier today?

A. That is right.

Mr. Holohan: That is all on redirect, your Honor.

Recross Examination

Q. (By Mr. Whitney): Mr. Mathis, do you know why those 578's were in that desk, these form 578's, why they were in the desk?

A. Do I know why they were in the desk?

Q. Yes. [85]

A. No, sir.

Q. When you were manager down there, and you wanted to discuss a matter with a farmer in connection with that, did you put anything in the desk to remind you of it? A. Yes, sir.

Q. And Mr. Short may have put that in his desk for the same purpose?

Mr. Holohan: I object to that as speculation.

The Court: Yes, sustained.

Q. (By Mr. Whitney): Now, the United States

(Testimony of H. L. Mathis.)

Attorney asked you with reference to the Mr. Beggs and Mr. Haley overplanting.

You testified here, I believe, in cause Number 14,380, United States of America versus John E. Beggs, is that right?

A. Yes, sir, I testified.

Q. And at that time didn't you pick out several farms that were overplanted out of the control register?

A. On the control register, yes, sir.

Q. And it shows that there was overplanting and no cotton destroyed.

A. That's what it shows on the control register, yes, sir.

Q. And they still got their Marketing Cards?

A. Yes, sir.

Mr. Whitney: That is all. [86]

Redirect Examination

Q. (By Mr. Holohan): You were not asked whether the 578's of the particular farm actually showed compliance, and whether or not they were in compliance, but what the work sheets showed?

A. That is right.

Q. Also on the penalty matter, which I overlooked for the moment, you were instructed by the State Office to hold off the assessment of penalty?

A. That is right.

Q. You knew of the existence of a criminal case against the Defendant, didn't you?

A. Yes, sir, we did.

(Testimony of H. L. Mathis.)

Q. You testified in the grand jury hearing in January of 1957? A. That is right.

Q. And the State Office also knew of such existence? A. That is right.

Q. Was there any mention in your instructions about the fact of the pendency of a criminal case?

A. I don't really remember. I think it was something to the effect that until litigation was straightened out in this matter, to withhold the penalty statement from Mr. Neely.

Q. What was the computation? What was the amount of penalty? [87]

A. I don't remember now. Somewhere in the neighborhood of 32, 33 thousand, I believe. .

Q. It was what?

A. Somewhere around 30 thousand, I believe.

Mr. Holohan: That is all.

Mr. Stanfield: No questions at this time.

Mr. Whitney: That is all, but we don't care about releasing Mr. Mathis.

The Court: All right. That is all.

(Witness excused.)

Mr. Hays: I will call Elizabeth Treadway Outlaw.

ELIZABETH TREADWAY OUTLAW
called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hays): Will you state your name, please?

(Testimony of Elizabeth Treadway Outlaw.)

A. Elizabeth Treadway Outlaw.

Q. You were formerly Elizabeth Treadway, is that correct?

A. Yes, sir.

Q. Have you been recently married?

A. Yes, sir.

Q. How recently? [88]

A. Last June is a year ago.

Q. Where do you live, Mrs. Outlaw?

A. I live in a little place called Mira Loma, out about 20 miles from San Bernardino.

Q. That is California?

A. California.

Q. You formerly lived in Arizona, in the Phoenix area, is that correct?

A. Yes, sir.

Mr. Hays: Will you mark these for identification, please.

The Clerk: Government's Exhibits 13-A, 13-B, and 13-C for identification.

(Said documents were marked as Government's Exhibits 13-A, 13-B, and 13-C for identification.)

Q. (By Mr. Hays): Mrs. Outlaw, in the years past, did your family own some property down in Pinal County?

A. Yes, sir.

Q. I will hand you Government's Exhibit 13-C for identification, and ask you to look at that.

A. Well, I can't remember the land very well, but I am sure that is correct.

Q. This was a patent, is that correct?

A. Yes, sir.

Q. And in there a Charles Treadway is mentioned, is that correct?

A. Yes, sir. [89]

(Testimony of Elizabeth Treadway Outlaw.)

Q. And who is that Charles Treadway?

A. That is my ex-husband.

Q. He was your husband, is that correct?

A. That was my husband, yes, sir.

Q. I hand you Government's Exhibit 13-B for identification, and what is that?

A. Warranty Deed.

Q. A Warranty Deed? A. Yes, sir.

Q. In there an Elizabeth Treadway and an Earl Treadway, or, rather, a Charles Treadway and Elizabeth Treadway convey to an Earl Treadway.

A. That is right.

Q. Is that correct? A. That is correct.

Q. I hand you Government's Exhibit 13-A for identification, and what is that?

A. Warranty Deed.

Q. And in that deed an Earl Treadway conveys to Elizabeth Treadway, is that correct?

A. That is right.

Q. Is that Elizabeth Treadway you?

A. Yes, sir. [90]

Q. And what description does that cover? Can you read the description?

Mr. Whitney: It speaks for itself.

A. (By the Witness): Lot 3 and 4. That is the same.

Q. (By Mr. Hays): And these all cover the same property, is that correct?

A. That is right.

Mr. Hays: At this time we will offer in evidence Government's Exhibits 13-A, B, and C.

(Testimony of Elizabeth Treadway Outlaw.)

Mr. Whitney: If the Court pleases, on those exhibits 13-A, 13-B, and 13-C, the Defendant Neely objects to them on the grounds there is no foundation for their introduction. They are incompetent, irrelevant, and immaterial as far as this case is concerned.

In other words, they are not binding on the Defendant Neely.

Mr. Stanfield: We make the same objection.

The Court: Objection overruled.

The Clerk: Government's Exhibits 13-A, 13-B, and 13-C in evidence.

(Said documents were received in evidence as Government's Exhibits 13-A, 13-B, and 13-C, respectively.)

Q. (By Mr. Hays): Mrs. Outlaw, referring to the land described in Government's Exhibits 13-A, 13-B, and 13-C, those deeds I showed you. [91]

A. Yes, sir.

Q. Was that land ever farmed?

A. Well, there was 80 of it farmed one year.

Q. And what year was that?

A. That's what I can't say, but it must have been in 1947 or 8.

Q. Has it been farmed since 1950?

A. No, sir.

Q. What state is the land in?

A. It has gone back to desert.

Q. It has gone back to desert? A. Yes, sir.

Q. Do you know the defendant Joe Short?

A. No, sir.

(Testimony of Elizabeth Treadway Outlaw.)

Q. Do you know the defendant Rex Neely?

A. No, sir.

Q. Do you know a W. R. Burns?

A. No, sir.

Q. Has that property been under lease since 1950?

A. No, sir.

Q. It hasn't?

A. No, sir. To my knowledge, it hasn't.

Mr. Whitney: I beg your pardon?

The Witness: To my knowledge, it has not.

Mr. Hays: That is all, your witness. [92]

Mr. Whitney: I have no questions on behalf of Neely.

Mr. Stanfield: No questions.

Mr. Hays: That is all, thank you. May this witness be excused, please?

Mr. Whitney: Oh, yes.

Mr. Hays: You are excused, and you may leave.

(Witness excused.)

Mr. Hays: Mr. Wolfe.

RAY WOLFE

called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hays): State your name, please.

A. Ray Wolfe.

Q. Where do you live? A. Youngstown.

Q. And by whom are you employed?

(Testimony of Ray Wolfe.)

A. Youngstown Land and Development Company.

Q. By whom were you employed in 1956?

A. The United States Department of Agriculture. [93]

Q. And in what capacity?

A. I was the farmer field man for the southern part of the state, out of the State Office. State Office Representative.

Q. In simpler language, what was your job?

A. Well, I was responsible for the over-all administration of the various programs assigned to the counties that were in my district.

Q. And you worked out of the State Office?

A. That is right.

Q. Had you been employed previously by the Department of Agriculture? A. Yes.

Q. In what capacities?

A. As a clerk in the County Office, to begin with. Later County Office Manager, and then finally the position I just mentioned.

Q. Do you know the Defendant Short?

A. Yes, I do.

Q. Do you know the Defendant Neely?

A. Yes.

Q. Did you have occasion to visit the Defendant Neely's Pinal County farm in 1956?

A. Yes, I did.

Q. About when was that? [94]

A. I believe it was the latter part of December.

(Testimony of Ray Wolfe.)

Q. Who was present at that time when you visited the farm, if anybody?

A. Who was present with me?

Q. Yes. A. H. L. Mathis.

Q. What was the purpose of your visit?

A. To measure Mr. Neely's farm.

Q. Did you see Mr. Neely? A. Yes.

Q. Did you have any conversation with Mr. Neely? A. Yes.

Q. And during that conversation, who was present?

A. Mr. Mathis, myself, and Mr. Neely.

Q. What was said?

A. Well, when we arrived there at the farm, Mr. Neely came there, there was the three of us talking, and I don't remember just exactly how it got started, but we soon made it known that we were there to measure the farm.

And he wanted to know why, or what it was about, and how come his farm.

And we told him that there was several farms that we had been instructed to measure. We had received instructions from the State Committee, and we weren't at liberty to go into it any further. And so it was all right with him for us to go ahead and measure his farm, which we did.

Q. Did you have any further conversations after the measurement?

A. I think so. One time, maybe twice.

Q. All right, when?

A. Well, I can't be sure exactly when. I know

(Testimony of Ray Wolfe.)

on one occasion at a time we measured there, we were talking about the fact that he was overplanted, had more cotton than his allotment, and he made mention of a lease that he had for, as I recall, 60 some-odd acres of cotton.

Q. What year was this in?

A. 1956. And I asked him if he had the lease, and he said he would see if he could find it, and he was going to bring it into the office if he could find it.

Then I talked to him in town, I think at the hotel where H. L. Mathis was working on weekends at one time.

Q. Who was present at that conversation?

A. H. L., and he, and myself.

Q. All right. And what was said?

A. I don't recall exactly. I know that he was interested in knowing just exactly what his position was, which we weren't in any position to tell him at the time, other than we were measuring it, his cotton.

He wanted to know about what it was going to cost him. I remember that that was a question quite often asked [96] of anyone who had excess cotton. We often said—I forget now in 1956 whether it was 150 or 175 dollars an acre, which was roughly the penalty on, say, Pinal County's average, and I think probably that I roughly multiplied the number of acres that he was overplanted, times either 150 or 175 dollars, and I probably stated that it

(Testimony of Ray Wolfe.)

would probably cost him at least that much, that I didn't know what further would happen.

Q. Did you have any further conversation with the Defendant Neely about this?

A. I don't recall it.

Q. Are you familiar with the Release and Reapportionment procedure that was used in Pinal County in 1954? A. Yes.

Q. What was the procedure?

A. Well, in 1954 in Pinal County, at least, it was being allowed for allotment from one farm to be released?

Q. What?

A. It was being allowed for the allotment from one farm to be released back to the County Committee with specific instructions to the County Committee that it be reapportioned to a specific farm.

Q. Was that procedure used in 1955 and 1956?

A. Well, I am sure it was not. In 1956 I know it was not. In 1955, I can't answer that positively, but I don't believe that it was. [97]

Mr. Hays: That is all, your witness.

Cross Examination

Q. (By Mr. Whitney): Now, your talk with Neely about the \$175 an acre, what he wanted to find out was what penalty, or what it would cost him?

A. I would assume so. That is the only information I could possibly even guess at.

(Testimony of Ray Wolfe.)

Q. As a matter of fact, didn't you have this penalty figured once on Mr. Neely's farm?

A. I can't be sure if we did on Mr. Neely's. On some of the cases that have gone before, I do know for a fact. It is likely we did. The record would probably bear it out one way or the other. From my own recollection, I can't state definitely.

Q. Where would you find that in the record, do you know?

A. All I know is this. At one time we in the County Office, on farms that we had established were overplanted, we prepared these notices of penalty due for overplanted farms. However, we never sent them out.

Q. Why were they not sent out?

A. They were not sent out, no.

Q. Why?

A. We were instructed not to send them out.

Q. By whom? [98]

A. I was instructed by the State Office. I believe it originated in the Legal Department. Our understanding was that the criminal aspects of the case were to be settled prior to the civil.

Q. In other words, rather than employ any such civil penalty, they were going to proceed criminally?

A. Yes.

Q. And they did in some cases, didn't they?

A. Yes.

(Testimony of Ray Wolfe.)

Q. Some cases that are through, and some that are coming up, and this one? A. Yes.

Q. Now, then, who sent out those notices of penalty? Would it be Mr. Mathis?

A. It would be a function of the County Office, and if at that time Mr. Mathis was the County Office Manager, that would be his responsibility, yes.

Q. And of course, if he got instructions from the State Office, or from the Government agents, he would not send them out, if he got those instructions? A. That is right.

Q. You know as a matter of fact that the penalty for Mr. Neely for 1956 was prepared?

A. No, I can't state that as a fact. I don't recall it specifically. [99]

Q. But it may have?

A. It may have, yes.

Q. Mr. Mathis would probably know that better, wouldn't he?

A. He might. I don't know.

Mr. Whitney: That is all.

Mr. Stanfield: No questions.

The Court: That will be all.

(Witness excused.)

The Court: The Court will stand at recess until ten tomorrow morning.

(Thereupon an adjournment was taken to the following morning, Thursday, September 11, 1958, at the hour of ten o'clock.) [100]

Thursday, September 11, 1958

Ten O'Clock A.M.

Court convened pursuant to adjournment.

Present: The same as before.

The Court: You may continue.

Mr. Hays: We will call Mr. Curry Love.

CURRY LOVE

called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hays): State your name, please.

A. Curry Love.

Q. Where do you live?

A. Casa Grande, Arizona.

Q. By whom are you employed?

A. At present, I am employed by the Palm Valley School in Palm Springs, California. [101]

Q. During the summer, did you have other employment in the past? A. Yes, I did.

Q. Specifically during the year 1956, in the summer did you have other employment?

A. Yes, I worked for the Pinal County Agricultural Stabilization and Conservation Committee.

Q. Had you worked there prior to that summer?

A. Yes, I had.

Q. How many years, or how many summer periods?

A. Approximately five. I am not sure of that.

Q. I hand you Government's Exhibit 11-D for

(Testimony of Curry Love.)

identification, and ask you to examine it, if you will. And what is that?

A. That is a Form we call a 578, which covers the cotton acreage on a farm, a produce farm.

Q. To whom does that pertain?

A. Rex Neely.

Q. And for what year? A. 1956.

Q. Have you ever seen that specific document before?

A. Well, I am not sure. Yes, I have. Yes, I have.

Q. Now, have you seen it before?

A. Yes, I have.

Q. Did you ever discuss that document with the Defendant Short? [102]

A. I did, yes.

Q. When? A. In the summer of 1956.

Q. And where?

A. In the Pinal County Office.

Q. And who was present?

A. Mr. Short and myself.

Q. And what was said?

Mr. Whitney: I object to it, as far as Mr. Neely is concerned, because Mr. Neely was not present.

The Court: All right, go ahead.

Mr. Hays: Go ahead and answer. What was said?

A. (By the Witness): Before I sent out the notices to the farmers, that was one of my duties to send out the notices, I gave the forms to Mr. Short to look over, and he said to hold this one out, not to send the notice immediately on it.

(Testimony of Curry Love.)

Q. (By Mr. Hays): Did you have any further conversation with Mr. Short concerning that particular document?

A. Yes. I kept the form in my desk for a while. I don't remember exactly how long. I asked Mr. Short at least twice, I am not sure how many times, about it, and he put me off some way. And then finally I took the form in to him, and just gave it to him, gave it to him in his room.

Q. Is that the last time you saw the document?

A. That, as far as I can recall, is the last time I saw the form.

Mr. Hays: Your witness.

Cross Examination

Q. (By Mr. Whitney): Who made the pencil notations of the acreage on that one?

A. Those are my figures.

Q. And on the back end?

A. Those are mine, too.

Q. Were you the computer down there?

A. There were three computers, I believe, that year.

Q. I note it contains supposedly the signature of the computer, Dorothy Pryor. Do you know how that came to be there?

A. No, I don't, unless we worked it together. It is one of the first maps we did, according to its number. It is Map I-2, Volume I, Map 2, and that would be one of the first ones we did. Perhaps we did it together. I am not sure.

(Testimony of Curry Love.)

Q. How long did you say you had that in your desk? A. I can't be sure.

Q. Can you approximate it? [104]

A. I would approximate it a month or five weeks.

Q. And what period of time was that?

A. I couldn't pinpoint the date on it.

Q. Was it prior or later than October, 1956?

A. It was prior.

Q. Prior. And do you remember when you gave that to Mr. Short?

A. No, I don't remember the specific date on that either.

Q. And Mr. Neely, at the time you had this, you didn't show it to Mr. Neely? A. No, sir.

Q. Did you know Mr. Neely at that time?

A. I did not.

Mr. Whitney: That is all.

Cross Examination

Q. (By Mr. Stanfield): Mr. Love, you stated first of all that you do not know exactly when you finished preparing this document, is that right?

A. I am not sure when it was finished. I presume it was early, because it was one of the first maps that was done, Map I-2, Volume I, Book 2, which was done early, I am sure.

Q. It was one of the first of the forms 578 that were computed, and that fixes the time in your mind? [105] A. That would be correct.

Q. Now, have you any recollection that Mr.

(Testimony of Curry Love.)

Short was employed there at the time as Office Manager? A. Yes, he was.

Q. Were you working in the office at that time, or were you working outside the office?

A. In the office.

Q. And you had plenty of occasion to see Mr. Short in the office, did you not? A. Yes.

Q. At the time you prepared this document, you would know whether Mr. Short was working full time or not, wouldn't you? A. Yes.

Q. And how was he working at that time?

A. Well, I can't pinpoint it as far as the 578 goes. I know that he was off sometimes during that summer, but whether it was then, I am sorry, I can't recall.

Q. When did your employment with the office end in that summer?

A. In the middle of September.

Q. I see. You are a school teacher, are you not?

A. That is correct.

Q. And you went back to Palm Springs to teach school as was your habit?

A. That is right. [106]

Q. Were you employed at the office when Mr. Short had his stroke in early September?

A. I was.

Q. And isn't it a fact that prior to that, prior to the time that he had the stroke he had been in ill health? A. That is correct.

Q. And isn't it a fact that from, oh, perhaps the

(Testimony of Curry Love.)

middle part of July he had only been working a couple of days a week in the office? A. Yes.

Q. And that as a result of his curtailment of time in the office, much of the paper work had gotten behind, isn't that right? A. Yes.

Mr. Stanfield: No further questions.

Redirect Examination

Q. (By Mr. Hays): Mr. Love, in response to a question from Mr. Whitney, you said you had asked Mr. Short about sending the notices out.

Now, what were those notices?

A. They were notices of overplant, or of compliance in relation to the cotton acreage. [107]

Q. In this particular instance, what would it have been, a notice of overplant, or a notice of compliance (handing document to witness)?

A. I can't tell from this document, but I recall the incident. It was overplant.

Q. It was a notice of overplant that would have been sent out when you asked about it, is that correct? A. That is right.

Mr. Hays: That is all.

Recross Examination

Q. (By Mr. Whitney): Mr. Love, you don't know whether the notice of overplant was ever sent out?

A. No, I don't know if it was ever sent out.

Q. Did you have anything to do with preparing the notice?

(Testimony of Curry Love.)

A. I simply gave them to Mr. Short, and then when he okayed them, I took them in to a girl, and she sent them. She typed the notices out.

Q. What was the name of the girl?

A. I believe it was Pauline Doster then. I believe she was the girl that sent it.

Q. You had nothing to do with the management of that office, did you? [108]

A. No, sir.

Q. In other words, you were just an employee and did what you were told?

A. That is right.

Q. The question of Mr. Short's illness was brought up. Do you remember when he was in the hospital?

A. I believe it was the early part of September. It was just prior to before I left, I know.

Q. And do you know where he was? Was Mr. Short in the hospital, or working part-time on the 3rd of October, 1956?

A. That I couldn't say.

Q. You haven't any recollection of that?

A. I wasn't there at that time. I left the middle of September.

Q. When did you leave?

A. The middle of September.

Mr. Whitney: That is all.

Recross Examination

Q. (By Mr. Stanfield): Mr. Love, did you have occasion to talk with Mr. Short, or at least see him after September 8th of that year?

(Testimony of Curry Love.)

A. I can't recall. I did see him in the hospital, yes. But I went down to the hospital with Mr. Mathis to see Mr. Short once. The time I don't recall, whether it was then [109] or not, I don't know.

Q. Did you have an opportunity to observe him at that time? A. Yes, I did.

Q. Would you describe his condition as it appeared to you.

A. For one thing, he couldn't speak——

Mr. Holohan: I object to that as immaterial.

The Court: He may answer.

A. (By the Witness): He couldn't speak. He couldn't express himself. He would write or point.

Q. (By Mr. Stanfield): I see. I would also like to ask this, Mr. Love. You said earlier that you finally gave to Mr. Short the Form 578 for the Short Staple for the 1956 crop year, that is correct, isn't it? A. That is correct.

Q. Isn't it a fact that this is only one of a number of 578 forms which were held up for one reason or another?

A. Yes, there were more than one.

Q. And that this wasn't an unusual occurrence at all?

A. No, there were other instances of the same.

Mr. Stanfield: Thank you.

Mr. Hays: No further questions. [110]

Recross Examination

Q. (By Mr. Whitney): Do you know approximately how many 578 forms were held up in the manner that you say this was?

(Testimony of Curry Love.)

A. No. I would be afraid to approximate it.

Q. As many as 30?

A. Perhaps. Not for long, maybe for only several days.

Q. Do you know any others that were held up for weeks? A. I recall one.

Q. You don't recall one? A. I recall one.

Q. Which one was that? A. John Beggs.

Q. John Beggs. He was the Chairman at the time of the office down there?

A. That is correct.

Q. Do you remember one from Mr. Haley?

A. I am not sure that I held one for that.

Mr. Whitney: That is all. No further questions.

Mr. Hays: That is all, thank you. May this witness be excused?

Mr. Whitney: No objection.

Mr. Stanfield: No objection.

The Court: He may be.

(Witness excused.) [111]

Mr. Hays: Mr. Ruth.

GLENN L. RUTH

called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hays): State your name, please.

A. Glenn Ruth.

Q. Where do you live? A. Mesa.

(Testimony of Glenn L. Ruth.)

Q. By whom are you employed, and in what capacity?

A. I am employed by the Valley National Bank, Main Street Branch, in Mesa, as Assistant Manager.

Q. You were supposed to bring certain records to this trial, is that correct? A. That is right.

Q. If you will, I will ask you to hand me these particular records, and hand me the ledger sheet, please, and the deposit slips, and Recordak.

A. I will get these back?

Q. Eventually.

A. These are bank records. I would like to hold on to them. [112]

Mr. Hays: If I may have just a moment to examine these. This is the first time we have seen them.

May these be marked?

The Clerk: Government's Exhibits numbers 20, 21, 22, and 23 for identification.

(Said Bank Records were marked for identification as Government's Exhibits 20, 21, 22, and 23, respectively.)

Q. (By Mr. Hays): I hand you Government's Exhibit 20 for identification, and ask you to state generally what that is.

A. This is a ledger sheet, which is the record of checks and deposits made by the depositor, covering the period September 22, 1954, to— It covers the period from September 3, 1954, through September 22, 1954.

Q. Pertaining to what account?

(Testimony of Glenn L. Ruth.)

A. October 15th, it covers.

Q. Pertaining to what account?

A. Rex L. Neely or Louise Neely.

Q. What is your position with the Valley National Bank at Mesa?

A. I am assistant manager.

Q. And you are presently acting manager, is that correct, in the absence of the manager?

A. In the absence of the manager, yes.

Q. And you have this record under your custody and [113] control as such manager?

A. That is right.

Q. That is a record kept in the normal course of business, isn't that right?

A. That is right.

Q. And you brought this from the records of the bank, is that correct?

A. Right.

Q. I will hand you Government's Exhibit 21 for identification, and ask you to state what that is.

A. This is a deposit slip in the amount of \$1500, deposited October 7th, 1954, or it is dated October 7th. We accepted it October 9th, in the name of Rex L. Neely.

Q. And that is from the official records of the bank?

A. Yes.

Q. I hand you Government's Exhibit 22 for identification, and ask you to state what that is.

A. This is a Recordak film of checks and deposits. That is transit items, items on banks other than our own, covering the period of October 9, 1954.

Q. Are there numerous items on that?

A. There are numerous items.

(Testimony of Glenn L. Ruth.)

Q. Is there one item on there pertaining to Rex L. Neely?

A. There is one. There is a picture of one check on this film of an item deposited by Rex L. Neely on October 9, [114] 1954, in the amount of \$1500.

Q. Did you cause a photostat of that to be made?
A. Yes, we did.

Q. And have you compared that with the photostat, that item?
A. I don't understand.

Q. Have you compared the photostat with the item on the Recordak, which is Government's Exhibit 22? Are they one and the same?

A. Yes, the photostat was made from the film.

Q. I hand you Government's Exhibit 23 for identification. Is that the photostat which was made from the Recordak which is Government's Exhibit 22?
A. It is.

Q. And this Recordak came from the official records of the bank which are in your custody and control?
A. It did.

Mr. Hays: At this time we offer in evidence Government's Exhibits 20, 21, and 23.

Mr. Whitney: I would like to ask the witness a question on voir dire.

The Court: All right.

Q. (By Mr. Whitney): Mr. Ruth, this deposit slip shows 1137, that is apparently \$1500? [115]

A. Right.

Q. Where did that number come from in banking parlance?
A. You mean 1137?

Q. Yes.

(Testimony of Glenn L. Ruth.)

A. That is a so-called transit number, which indicates the bank that the check was drawn on.

Q. Is this the one that the check was drawn on?

A. That is right.

Q. Where is the 1137 there?

A. (Indicating.)

Q. Oh, yes. And that is the Federal Reserve Bank at San Francisco?

A. Federal Reserve Bank at Los Angeles. The Los Angeles Branch of the Federal Reserve Bank.

Q. Oh, yes, of San Francisco. I notice that lots of payments out of this account were overdrafts.

A. That is right. There is an overdraft.

Mr. Whitney: The only objection I have got, your Honor, is this is a copy of the check. It seems to me that the original would be the best evidence. I object to it upon that ground alone.

The Court: It may be received.

The Clerk: Government's Exhibits 20, 21, and 23 in evidence.

(Said Documents were received in evidence as Government's Exhibits 20, 21, and 23, respectively.) [116]

Mr. Hays: We ask permission of the Court and counsel to return the Recordak, Government's Exhibit 22 for identification to the bank. It is for identification only.

Mr. Whitney: Oh, yes, you can give it back to him.

Mr. Hays: That's all we have of this witness.

Mr. Whitney: I have no questions.

Mr. Stanfield: That is all. No questions.

Mr. Hays: That is all. May this witness be excused permanently?

Mr. Whitney: I think so.

The Court: He may be.

(Witness excused.)

Mr. Hays: Mr. Kennedy.

DOYLE S. KENNEDY

called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hays): State your name, please.

A. Doyle S. Kennedy.

Q. Where do you live? [117]

A. I live in Concord, California.

Q. By whom are you employed, and in what capacity?

A. I am employed by the United States Department of Agriculture, as Special Agent in the Compliance and Investigation Division, Commodity and Stabilization Service.

Q. Did you assist in making the investigation in this case? A. Yes, sir.

Q. Do you know the defendant, Joe L. Short?

A. Yes, sir.

Q. Did you ever discuss the matters involved in this case with Mr. Short? A. I did.

Q. When?

A. On numerous occasions. The first time was

(Testimony of Doyle S. Kennedy.)

the early part of January, about January 10th, 1957.

Q. Then you had subsequent conversations with him? A. Yes, sir.

Q. Who was present?

A. At the initial conversation with him, his attorney Mr. Bill Stanfield was present, and Mr. Reed Cardon, another Special Agent of our Division.

Mr. Hays: Will you mark these for identification.

The Clerk: Government's Exhibits 14-A, 14-B, and 14-C; and Government's Exhibit 15 for identification. [118]

(Said Checks and Lease were marked for identification as Government's Exhibits 14-A, 14-B, 14-C; and Government's Exhibit 15.)

Q. (By Mr. Hays): I hand you Government's Exhibit 14-A for identification, and ask you to examine that.

What is it, just generally?

A. This is a check drawn, signed with the name of Rex L. Neely, to the order of Joe Short, drawn on the Mesa, Arizona branch of the Valley National Bank, dated April 5, 1954, in the amount of \$1,620.00.

Q. Did you ever discuss that with Mr. Short?

A. Yes, sir, I did.

Q. And I will hand you Government's Exhibit 14-B, and ask you to examine that.

A. This is a check drawn on the same bank, under the date of November 22, 1954, in the sum of

(Testimony of Doyle S. Kennedy.)

\$1,410.00, with the name Rex L. Neely signed as the drawer, and endorsed by the name of Joe L. Short.

Q. I hand you Government's Exhibit 14-C for identification, and ask you to examine that, if you will, please, and state what it is?

A. This is a check similar to the other two, drawn on the same bank, and for the same person, Joe L. Short, signed by Rex L. Neely, dated December 9, 1955.

Q. Did you have a conversation with Mr. Short regarding [119] these three items?

A. Yes, sir.

Q. Do you recall when that was?

A. That was in the early part of February, 1957.

Q. And who was present?

A. At that conversation, Special Agent Lloyd Johnson and I talked with Mr. Short.

Q. With regard to Government's Exhibit 14-A, what was your discussion with regard to that?

A. Is that the check dated—

The Court: Just a minute.

Mr. Whitney: I object as to the Defendant Neely, on the grounds there is no connection with him. As to the introduction of the checks themselves, that is something else again. His conversations with Mr. Short out of the presence of Mr. Neely are not admissible.

The Court: It would be admissible against Mr. Short. Go ahead.

Mr. Whitney: Against Mr. Short, that is right

(Testimony of Doyle S. Kennedy.)

Q. (By Mr. Hays): Proceed. What was your conversation regarding Government's Exhibit 14-A?

A. That was the check with the earlier date?

Q. I will hand it to you, so there will be no confusion.

A. This is a check for \$1,620.00 dated April 5, 1954. Mr. Short stated that he had received this check from [120] Mr. Neely in payment for securing excess, or extra cotton allotment acreage for him for the crop year of 1954.

Q. All right. With regard to Government's Exhibit 14-B for identification, what was your conversation with Mr. Short regarding that?

A. This is the check for \$1,410.00 dated November 22, 1954.

Mr. Short stated that he had accepted this check from Mr. Neely for securing extra cotton allotment for him for the crop year of 1955.

Q. Now, with regard to 14-C, what was your conversation regarding that?

A. This is a check in the amount of \$1,750.00, dated December 9, 1955.

Mr. Short stated that Mr. Neely had paid him this check for securing cotton allotment for the 1956 crop year.

Q. When was the first time you saw these three exhibits which we have just referred to?

A. I saw those three checks first at Mr. Neely's home in the early part of January, 1957. Or during the month of January. It might have been past the middle of the month.

(Testimony of Doyle S. Kennedy.)

Q. I hand you Government's Exhibit 15 for identification, and ask you to state, just generally, not specifically, what that is.

A. May I correct my testimony of just a minute ago? [121]

Q. Yes.

A. It may have been in February that I saw those checks. And it was at the ASC Office rather than at Mr. Neely's home.

Q. All right, proceed.

A. May I have the question again on this, please?

Q. Will you tell us what that is, just generally? Not specifically.

A. This appears to be a Lease dated March 30th, 1954.

Q. And when did you first see that Lease?

A. This I saw first at Mr. Neely's home in the latter part of January, 1957.

Q. And who was present at that time?

A. Special Agent Johnson and I were there discussing the matter with Mr. Neely.

Q. You had some conversation with Mr. Neely?

A. Yes, sir.

Q. And the conversation related to that lease?

A. Yes, it did.

Q. And what was said by Mr. Neely at that time?

A. Mr. Neely stated that he had obtained for the 1954 crop year this lease in exchange for his pay-

(Testimony of Doyle S. Kennedy.)

ment to Mr. Short of the, I believe \$1,620.00 he paid him for the extra cotton allotment.

Q. And Mr. Neely gave this lease to you and Mr. Johnson, is that correct? [122] A. Yes, sir.

Mr. Hays: We offer Government's Exhibit 15 in evidence.

Mr. Whitney: No objection at all.

Mr. Stanfield: No objection.

The Court: It may be received.

The Clerk: Government's Exhibit 15 in evidence.

(Said Lease was received in evidence as Government's Exhibit 15.)

Q. (By Mr. Hays): Did you ever discuss Government's Exhibit 15 in evidence with Mr. Short?

A. Yes, sir.

Q. When was that?

A. It was, I believe, in the early part of February, 1957.

Q. And who was present?

A. Special Agent Johnson and I discussed the matter with Mr. Short.

Q. And what was said?

A. Mr. Short said that he prepared this Lease himself in the ASC Office, and that he signed the Lease with the name of W. R. Burns, which he admitted was fictitious. That Mr. Rex Neely signed the Lease in his presence, also.

Q. Okay. Thank you. Referring again to Government's Exhibit 14-A, B, and C, and your conversation with Mr. Short [123] regarding them, did he

(Testimony of Doyle S. Kennedy.)

indicate whether or not he negotiated those checks?

A. Yes, sir. He stated with respect to these checks that the first two, Government's Exhibits 14-A and B, he thought that he had cashed and retained at least part, if not all of the money, putting the balance in his bank account.

With respect to Government's Exhibit 14-C, the third check for \$1,750.00, he stated that he had deposited it to his checking account in Casa Grande.

Q. Did he make any statement with regard to the endorsement on the back?

A. He stated that he had accepted these checks from Mr. Neely, and had cashed them.

I did not ask him whether this was his endorsement on the back. The whole tenor of the discussion was that these were checks that represented payment to him from Mr. Neely.

Mr. Hays: At this time, we will offer in evidence Government's Exhibits 14-A, B, and C.

Mr. Whitney: May I ask, these are three checks that were picked up by the Government from Mr. Neely?

Mr. Hays: That Mr. Neely gave the Government Agent.

Mr. Whitney: As far as Mr. Neely is concerned, there will be no objection.

Mr. Stanfield: No objection. [124]

The Court: It may be received.

The Clerk: Government's Exhibits 14-A, 14-B, and 14-C in evidence.

(Testimony of Doyle S. Kennedy.)

(Said Checks were received in evidence and marked as Government's Exhibits 14-A, 14-B, and 14-C.)

Q. (By Mr. Hays): Let us refer back to Government's Exhibit 15 in evidence. Calling your attention to that document on the bottom there, you will see a signature which purports to be the signature of Joe L. Short.

Did Mr. Short indicate whether or not he had signed that as a witness?

A. Yes, sir, he indicated that this was his signature.

Q. That he had signed as a witness on the Lease?

A. Yes, sir.

Q. Mr. Kennedy, I will hand you Government's Exhibit 1 in evidence. Now, that is what, Mr. Kennedy?

A. This is the Listing Sheets for both Short Staple and Long Staple cotton for the Crop Year of 1954.

Q. Will you refer to Farm 647, Short Staple Cotton, in that listing sheet.

A. Yes, sir, I have it.

Q. Did you have any discussion with the Defendant Short concerning an entry pertaining to Farm 647 on the Listing Sheet there?

A. Yes, sir, I did. [125]

Q. And when did this occur?

Mr. Whitney: I object to that on the part of Neely, as far as my client, Mr. Neely.

The Court: All right, go ahead.

(Testimony of Doyle S. Kennedy.)

Mr. Hays: Proceed.

A. (By the Witness): This occurred, I believe, during the month of February, 1957, at the ASC Office. Mr. Johnson and I were again talking with Mr. Short about this matter.

Q. (By Mr. Hays): What was said with regard to that item?

A. With regard to this entry, I asked Mr. Short why the original allotment of 319.8 acres had been changed to 400.8 acres, and he stated that, and this is for Farm 647, Mr. Rex L. Neely, and he stated that he had made or caused this change to be made in order to include therein the acreage from the dummy farm Number 595.

Shall I explain what that is?

Q. That's all on that part, thank you.

Do you have an entry on the Listing Sheet pertaining to 595, the dummy farm?

A. Yes, sir, I do.

Q. Will you find that, please.

A. I found it.

Q. What is the final entry there pertaining to that dummy farm? [126]

A. The final entry is zero.

Q. Is zero? A. Yes, sir.

Q. Are there any symbols there indicating the disposition of cotton allotment?

A. Yes, sir. The original allotment of 73.4 acres is struck out, deleted, and the initials SA, meaning "Surrendered Acres" is placed by it. And if I may go ahead?

(Testimony of Doyle S. Kennedy.)

Q. Go ahead.

A. On the Listing Sheet for Rex Neely, when the allotment was increased from 319.8 to 400.8 acres are the initials RA, which means "Released Acreage," or reapportioned acreage.

Q. Thank you. At this time, I hand you Government's Exhibit 9 for identification, and ask you just generally what is that folder?

A. This is a folder containing the material relating to Farm Number 595.

Q. Did you have any discussion with the Defendant Short regarding Farm 595?

A. Yes, sir.

Q. And when was that?

A. I discussed it with him several times. The first time was in the original conversation which I have related took place on January 10th, at which time Mr. Short acknowledged that he had accepted money for procuring extra allotments for [127] three different farmers in three crop years, with Mr. Neely being one of the farmers, and that he had used in 1954 Farm Number 595, the dummy farm, which he knew was not a farm at all, but which inadvertently had been allotted acreage for that year, that he had applied that acreage and changed the Listing Sheet for Mr. Neely to show the increase, or added that increase to Mr. Neely's original allotment.

Q. Did you discuss some of these specific documents on the Farm Folder, Government's Exhibit 9?

(Testimony of Doyle S. Kennedy.)

A. Yes, sir, I did, at a later time.

Mr. Hays: Mark that 9-A for identification, please.

The Clerk: Government's Exhibit 9-A for identification.

(Said Document was marked as Government's Exhibit 9-A for identification.)

Q. (By Mr. Hays): I hand you Government's Exhibit 9-A for identification. What is that?

A. This is a form which shows, or purports to show the production for the three years prior to 1954, the first year in which allotments were effective.

Q. With regard to what farm?

A. With regard to Farm 595.

Q. Did you have any conversation with the Defendant Short regarding that specific form?

A. Yes, sir, I did. [128]

Q. Government's Exhibit 9-A. Where was that?

A. This conversation was with Mr. Short in the ASC Office again. Mr. Johnson was present, and was, it was during either the latter part of February or in March, 1956.

Q. Let me show that to Mr. Whitney.

You had a conversation regarding that document with Mr. Short, is that correct? A. Yes.

Q. Will you tell us that conversation?

A. Yes, sir. He stated that this document was the basis for making up the listing sheet on any farm, and with regard to this particular farm, he had prepared this document himself. He identified

(Testimony of Doyle S. Kennedy.)

as his handwriting all of the writing on the document.

Q. And he had prepared it? A. Yes, sir.

Q. Who is the purported owner of this 595, as shown on that document? A. W. R. Burns.

Mr. Hays: We will offer Government's Exhibit 9-A in evidence.

Mr. Whitney: If your Honor please, we object to it as not binding on Mr. Neely, no proper foundation as far as Neely is concerned.

The Court: All right. [129]

Mr. Stanfield: I would like to ask Mr. Kennedy a couple of questions on voir dire, please.

The Court: You may.

Q. (By Mr. Stanfield): Mr. Kennedy, you are quite familiar with Government's Exhibit 1, are you not?

A. I have seen it several times, yes, sir.

Q. Would you turn to the listing sheet there for 1954, on Farm 595?

A. Yes, sir. I have it.

Q. You have examined that particular line before, haven't you, Mr. Kennedy? A. Yes, sir.

Q. You are familiar with what it says there, aren't you?

A. I couldn't recite it from memory, but by referring to it I know what it says.

Q. Now, on 595, for the year 1954, would you read the name designated as "operator," and the name designated as "owner."

A. Yes. The name of "operator" is shown as

(Testimony of Doyle S. Kennedy.)

Julian Woodruff, and the name of "owner" is shown as Kemper Marley.

Q. Mr. Kennedy, I hand you 9-A for identification here, and ask you to read the name designated at the top of that as the owner and operator.

A. Owner is W. R. Burns. The name of the operator is [130] shown as None.

Q. How do you account for the fact that the Listing Sheet designates the owner and operator as one party, or two parties, rather, neither one of which is on this form—what form is that?

A. This form is CN-364.

Q. How can you account for that difference, Mr. Kennedy?

A. The only accounting I can give for it is that Mr. Short told me this was purely fictitious and made up to support the alleged allotment.

Q. Can you state when this was made up?

A. I can only state what Mr. Short told me. He stated that he made it up.

Q. When? Did he tell you when?

A. No, sir. It was in the file folder when I examined the file folder.

Q. Did you examine the Listing Sheets for 1953?

A. There would have been none, as far as I know. There was no allotment in 1953.

Q. But there was allotment in 1950?

A. I didn't go back that far.

Q. You don't know prior to 1954 in connection with these items, you don't know who was the legal

(Testimony of Doyle S. Kennedy.)

owner as far as the office is concerned? You don't know who was the owner and operator, do you?

A. No, as far as I was concerned I was interested in the years 1954, '55, and '56, those being the years Mr. Short stated he accepted money for the allotment.

Mr. Stanfield: There is no objection.

Mr. Hays: All right.

The Court: It may be received.

The Clerk: Government's Exhibit 9-A in evidence.

(Said Document was received in evidence as Government's Exhibit 9-A.)

The Court: We will have our morning recess at this time.

(Recess.)

The Court: You may continue.

Q. (By Mr. Hays): Mr. Kennedy, I will hand you Government's Exhibit 9-A in evidence, and also Government's Exhibit 15 in evidence, and ask you whether or not there is a description of land on each of those documents? A. Yes, sir.

Government's Exhibit 9-A is the Farm Acreage Report made out in the name of W. R. Burns, and contains a description of the unit covered by the information therein.

Government's Exhibit 15, the Lease, also contains description of the unit covered by the Lease.

Q. I will hand you Government's Exhibit 13-A, and ask you [132] what that is.

A. This is a Warranty Deed made out to, or be-

(Testimony of Doyle S. Kennedy.)

tween Earl Treadway and Elizabeth Treadway. It also contains a description of the land covered therein.

Mr. Whitney: If the Court please, they speak for themselves. Nobody is questioning the description.

The Court: I don't know what this is leading to. Go ahead.

Q. (By Mr. Hays): All right, would you compare the description in the Warranty Deed with the descriptions contained in the previous two exhibits I gave you, which are 9-A and 15, and ask you whether or not the portion of the same land is involved? A. Yes, sir, it is.

Q. Mr. Kennedy, at this time I hand you Government's Exhibit 8 for identification, and ask you to state what that is.

A. This is a folder labeled to contain Form CN-410, Upland Cotton, 1954 Cotton Acreage Allotments, Release and Reapportionment Supplement.

Q. Now, did you have any discussion with the Defendant Short regarding an entry in that form?

A. Yes, sir, I did.

Q. When was that?

A. I believe that was in March, 1957. Either February [133] or March.

Q. And where was it?

A. It was at the County ASC Office with Mr. Johnson present.

Q. A Mr. Johnson was present?

A. Yes, sir.

(Testimony of Doyle S. Kennedy.)

Q. All right, what was said with regard to Farms 647 and 595?

Mr. Whitney: We object as applied to Neely.

The Court: All right, go ahead.

A. (By the Witness): Mr. Short stated that by the use of this form he made the entry for 595, the dummy farm, showing the release of the allotment for that year, and made another entry for Farm 647 showing it had been released to Farm 647, Mr. Neely's farm.

Mr. Hays: At this time we offer in evidence Government's Exhibit 8.

Mr. Whitney: Mr. Neely objects on the ground there is no proper foundation laid as against him.

The Court: All right.

Mr. Stanfield: I would like to ask this witness a question on voir dire.

The Court: You may.

Q. (By Mr. Stanfield): Mr. Kennedy, these records here containing Government's [134] Exhibit 8 for identification actually amount to a bunch of summarizations, do they not?

A. I don't know what you mean by "summarizations," because these show the individual numbers of the individual farms that are affected by this release and reapportionment procedure.

Q. Each of the entries on here is a summary taken from another document, presumably, and entered in here for the purpose of compiling a total, isn't that correct?

A. I wouldn't know, sir.

(Testimony of Doyle S. Kennedy.)

Q. Don't they appear to you there to have been made at one time?

A. I am not competent to pass on that. This is within the official records, and when I looked at it I saw that Farm Number 647 had a Reapportionment, a reapportioned allotment of 81 acres.

Farm 595 had an indication showing that a total of 73—wait just minute. A release of 73.4 acres.

Q. And you don't know how that figure came to be there?

A. All I know is Mr. Short said it was one of the forms kept in his office under that program.

Q. This was one of the forms kept?

A. One of the records kept in the office in 1954, yes, sir.

Q. Didn't he tell you where these figures were arrived at? [135]

A. I don't recall that he did.

Mr. Stanfield: Defendant Short will object to this on the basis of no foundation. Furthermore, it is not the best evidence.

The Court: All right, it may be received.

The Court: Government's Exhibit 8 in evidence.

(Said Document was received in evidence as Government's Exhibit 8.)

Q. (By Mr. Hays): I will hand you Government's Exhibit 17-C for identification, and ask you just generally what is that?

A. This is the original of an Allotment Notice for the crop year of 1954, made out to Mr. Neely.

Q. Have you seen it before?

(Testimony of Doyle S. Kennedy.)

A. Yes, sir, I have.

Q. And when was the first time you saw that?

A. The first time I saw that was when Mr. Johnson and I were talking with Mr. Neely in January of 1957, and Mr. Neely produced this from his records at his home in Chandler.

Q. And he gave that to you?

A. Yes, sir, this and two others.

Q. Have you had any discussion with the Defendant Short regarding that?

A. Yes, sir, I have.

Q. And when was that? [136]

A. Well, the first general discussion was Mr. Short's statement to me in January in our original contact with him, Special Agent Cardon and I.

That in each of the three years——

Q. Just a moment. Who was present at that time?

A. Mr. Stanfield, Mr. Short's attorney, Mr. Cardon, and I.

Q. First, what was said?

A. That in each of the three years, he had supplied Mr. Neely with an Allotment Notice covering the total amount of allotment, that is, his bona fide—his original allotment, plus the allotment Mr. Short secured for him. That for the year 1954 he had run this notice, and run the figures through the official records.

Q. Through what?

A. Through the official ASC records. That would be the lining out of this 1954 Listing Sheet,

(Testimony of Doyle S. Kennedy.)

and showing the additional amounts. That for the year 1955 and 1956 he had not changed any records, it was merely between Mr. Neely and him. And that he had, he thought, supplied Mr. Neely with only the original of the Allotment Notice, that it did not show up in the County Records.

Q. Did he make any statement with regard to that specific notice, however, Government's Exhibit 17-C?

A. Only that this is a Revised Notice which included the [137] allotment, the extra allotment acreage which he had secured for him.

Q. And he had caused it to be made up, is that correct?

A. Yes, sir, it was made up, he had stated, in the office.

Mr. Hays: We offer 17-C in evidence.

Mr. Whitney: As far as the Defendant Neely is concerned, there is no objection.

Mr. Stanfield: Defendant Short has no objection.

The Court: It may be received.

The Clerk: Government's Exhibit 17-C in evidence.

(Said Document was received in evidence and marked as Government's Exhibit 17-C.)

Q. (By Mr. Hays): I would like to hand you Government's Exhibit 11-B for identification, and ask you to examine that, please.

Generally, what is it?

A. This is referred to as Form 578, and it is with respect to the 1955 crop of Mr. Neely, the

(Testimony of Doyle S. Kennedy.)

measurements, and the figures showing the measured cotton, plus other showing destruction of cotton.

Q. Did you have any conversation with Mr. Short regarding that specific form?

A. Yes, sir, I did.

Q. When was that? [138]

A. That was in either February or March, 1957, at the County Office, at the ASC Office in Casa Grande, with special agent Johnson also being present.

Q. What was said at that time with regard to that form?

A. Mr. Short stated that he placed the "destroyed" figures in here, which are in red ink, and which total some 120 acres, and the final measurement after deducting the 120 acres, he placed those in there in order to make it appear that Mr. Neely was within his bona fide allotment.

The total acreage as measured was 426.5 acres. After deducting the destroyed acreage inserted in here of 120.4, the result is 306.1 acres, which was the allotment as shown on the records of the County Office.

Q. Did he state whether or not that cotton had been destroyed?

A. He stated it had not at that time.

Mr. Hays: We offer Government's Exhibit 11-B in evidence.

Mr. Whitney: May I ask one question?

The Court: You may.

Q. (By Mr. Whitney): Mr. Kennedy, did Mr.

(Testimony of Doyle S. Kennedy.)

Short tell you that those figures in red ink were on there when Mr. Neely signed that?

A. No, sir, he did not. My recollection is that he told me at that time that he didn't recall—first, may I say [139] that he stated Mr. Neely signed this in his presence on August 18, 1955.

Q. I see.

A. And that he did not think at that time those red figures were on there.

Mr. Whitney: We object to this on behalf of the Defendant Neely, on the grounds it is incompetent, irrelevant, and immaterial, and not the proper foundation.

The Court: It may be received.

The Clerk: Government's Exhibit 11-B in evidence.

(Said Document was received in evidence as Government's Exhibit 11-B.)

Q. (By Mr. Hays): I hand you Government's Exhibit 11-C for identification, and ask you what that is.

A. This is a similar—the same type of form reporting the Long Staple Cotton. The Form 11-B was for short staple.

Q. For the same year?

A. For the same year.

Q. For the same farm?

A. For the same farm. It also shows one point eight acres destroyed cotton in red ink, bringing the planted figure down to 3.8 acres from a measured figure of 5.6 acres.

(Testimony of Doyle S. Kennedy.)

Q. Did you have any conversation with the Defendant Short with regard to that particular form?

A. Yes, sir. [140]

Q. At the same time as previously mentioned with the other form? A. Yes, sir.

Q. And what was said?

A. The same circumstances as I have previously testified.

We talked about these two forms together, that it was signed in his presence by Mr. Neely, and that he, Short, had inserted those figures to bring it down so it would agree with the official records in the County Office.

Q. Did he say that this cotton had actually been destroyed?

A. He said it had not been destroyed.

Mr. Hays: We offer Government's Exhibit 11-C in evidence.

Mr. Whitney: May I ask a question on voir dire?

The Court: You may.

Q. (By Mr. Whitney): Mr. Kennedy, did Mr. Short tell you that when Mr. Neely signed this the figures in red were on that?

A. In my discussion on that, in both forms, Mr. Short's statement was he didn't think that they were on there.

Mr. Whitney: Defendant Neely objects to it on the grounds there is no proper foundation, not properly identified.

The Court: It may be received.

(Testimony of Doyle S. Kennedy.)

The Clerk: Government's Exhibit 11-C in [141] evidence.

(Said Document was received in evidence and marked Government's Exhibit 11-C.)

Q. (By Mr. Hays): I will hand you Government's Exhibit 11-E in evidence, and ask you if you have seen that form before?

A. Yes, sir, I have.

Q. What is it?

A. This is a copy, the office copy of an Allotment Notice to Mr. Neely for the crop year of 1956, indicating an allotment of 367.7 acres, and is dated December 1, 1956.

Q. Did you discuss that exhibit with the Defendant Short? A. Yes, sir, I did.

Q. Who was present?

A. Special Agent Johnson and I.

Q. Where was that?

A. At the County Office in Casa Grande.

Q. What did Mr. Short say with regard to that exhibit?

A. Mr. Short stated with respect to this exhibit that after the investigation of the Pinal County was started, which was in November, 1956, as a matter of fact, after I had left there the early part of December, that he instructed Mr. Mathis to make up this form and show an increased allotment.

I believe the proper allotment for this year was about 307 and some tenths acres. This allotment was made up [142] for 367.7 acres, and that he had

(Testimony of Doyle S. Kennedy.)

done that in order to try to conceal from the investigators the fact that a lesser allotment had been issued.

Q. Thank you. Excuse me just a moment.

Mr. Kennedy, I will hand you Government's Exhibit 12-A for identification, and ask you to examine that.

Generally, what is that document?

A. Generally, this is an application under the Agricultural Conservation Program, commonly known as ACP, for assistance in sharing the costs of both land leveling and ditch lining on the farm, executed by Mr. Neely, and dated May 24, 1954.

Q. Did you have any discussion with the Defendant Short concerning that document?

A. Yes, sir, I did.

Q. And when?

A. Either February or March, 1957.

Q. Where?

A. At the same Casa Grande County Office.

Q. And who was present?

A. Special Agent Johnson and I.

Q. What was said?

A. We discussed this form, and asked Mr. Neely when he made this application.

Mr. Whitney: Just a moment. You asked Mr. Neely, [143] or Mr. Short?

The Witness: I am sorry.

Q. (By Mr. Hays): Your conversation was with whom?

A. This conversation was with Mr. Short.

(Testimony of Doyle S. Kennedy.)

Q. All right, proceed.

A. And asked Mr. Short when this, if this date of May 24, 1954, was the correct date, and Mr. Short stated that it was.

Then we asked Mr. Short about the pencilled notation on here, which says, "Request for change of approval from first to second practice," the first practice being the land leveling. The second practice shown on here being ditch lining, and that has a date of 5/27/54. And Mr. Short stated that that was the date that this request had been made to change practices from number one to number two.

Q. I hand you Government's Exhibit 12-D for identification, and ask you what that is.

A. This is also an ACP form. Its number is 247. And it is a form used by the office to determine whether or not the practice shown above, and in this case it shows ditch lining, is needed, and it has a second space to show whether or not it is approved.

Q. At the same time as this previous conversation on the previous document, did you have a conversation with Mr. Short? A. Yes, sir. [144]

Q. Under the same circumstances?

A. Yes, sir.

Q. And what was said?

A. We asked him with respect—and I might add that on this form there is the statement of need approved by the Soil Conservation Service Technician, which is a requirement before any further thing could be done. It is signed "Doyle H. Dunkin", and

(Testimony of Doyle S. Kennedy.)

dated September 1, 1954. Mr. Dunkin's affiliation is shown as USID, which I believe is United States Indian, it has to do with the Indian Bureau.

Q. Interior Department?

A. Interior Department, I am sorry.

Q. Did Mr. Short make any statement with regard to the signature Doyle H. Dunkin?

A. Yes, sir, he did.

Q. What did he say?

A. He acknowledged he had forged the signature.

Q. That he had forged the signature "Dunkin" on that document? A. Yes, sir.

Q. All right. I hand you Government's Exhibit 12-E for identification, and ask you to examine that.

A. This is a carbon copy of the same form, with this time the Report of Performance filled out, showing 4,156 linear feet of lining had been put in, dated September 25, 1954, [145] and again signed with the name of Doyle, it is either H. or L., I am not sure which, Dunkin, with the United States Interior Department designation.

Q. Did you have a conversation at the same time, at the same place, and with the same people present, with Mr. Short concerning that document?

A. Yes, sir.

Q. What was said?

A. He made the same acknowledgment, that he had put the date on there, and had forged Mr. Dunkin's name there too.

Q. Excuse me, please.

(Testimony of Doyle S. Kennedy.)

All right, I will hand you Government's Exhibit 12-F, and ask you to examine that. What is it?

A. This is another ACP form which follows right in line with these, and this is the application for payment for the practices shown on both this and the preceding form.

Q. At the same time, the same place, and with the same people present, did you have another conversation? A. Yes.

Q. With Mr. Short? A. Yes.

Q. What was said with regard to that document?

Mr. Whitney: Mr. Neely was not present, though, was he?

The Witness: No, sir. [146]

Mr. Whitney: I object to it as to Mr. Neely.

A. (By The Witness): Mr. Short stated that he had executed these in such a manner as to, in the office procedure as it followed through, to make available this payment to Mr. Neely.

Q. (By Mr. Hays): I will hand you Government's Exhibit 12-A for identification, and ask you to look at that. A. Yes, sir.

Q. What is that?

A. This is the application for payment executed in the name of, and with the purported signature of Mr. Rex L. Neely, dated May 25, 1954. May 24.

Q. Did you also discuss that with Mr. Short, under the same circumstances?

A. Yes. This is the first of the four documents we discussed.

(Testimony of Doyle S. Kennedy.)

Q. Did he have any statement to make with regard to that?

A. Only that he identified that as his writing, the request for change of approval from land leveling to ditch lining. And that Mr. Neely signed it in his presence. It bears Mr. Neely's signature dated May 27.

Q. And he said Mr. Neely signed it in his presence? A. Yes.

Q. I hand you Government's Exhibit 12-B for identification, and ask you what that is. [147]

A. This is another Form 247, which I have testified was the intermediate form, where approval was given by the Soil Conservation Service, or another agency, and performance certified to.

Q. Did you discuss that one with Mr. Short at the same time?

A. Yes, sir. This is made out for land leveling. And it is, the form is signed at the bottom by Mr. Short, who identified his signature.

Q. Part of the procedure of the ACP, is that correct? A. Yes, sir.

Q. I will hand you Government's Exhibit 12-C for identification, and ask you what that is.

A. This is a carbon copy of the ACP Form 245, which is the final form, in this matter of handling it. This is similar to the white form which I was looking at a minute ago.

This shows land leveling, and is dated July 23, 1954, and shows the practice as approved by Joe Short.

(Testimony of Doyle S. Kennedy.)

Q. Did you have any conversation with the Defendant Short at the same time with regard to that?

A. Yes. This is one of the series of documents we discussed with him at the same time and place.

Q. And what did he say with regard to that document, if you recall?

A. To my recollection of this, it is that he stated that [148] this was never paid, because the practice was not approved for land leveling, and was changed over to this ditch lining which we have been discussing.

Q. Which we went into previously?

A. Yes.

Mr. Hays: At this time we offer in evidence Government's Exhibits 12-A, B, C, D, E, and F.

Mr. Whitney: May I have a moment to look at them, your Honor?

The Court: Yes.

Mr. Whitney: May I ask a question on voir dire?

The Court: You may.

Q. (By Mr. Whitney): Mr. Kennedy, referring to these exhibits, is that all the exhibits that were in the folder? A. Well, now, in what folder?

Q. In the folder that that came out of, of that ACP folder.

A. These were the ones we were interested in, and the only ones I remember discussing with Mr. Short.

Q. Was there another one in the folder showing

(Testimony of Doyle S. Kennedy.)

an application made by Mr. Neely in November, 1953, for ditch lining?

A. There may have been. The folder, as I recall now, contained not only for the year 1954, but for other years.

Q. All right. Now, then, what is the year, when would [149] you apply to do work in the spring of 1954, or anytime, when would you apply for that? You would apply in November or December, 1953, wouldn't you?

A. That is my understanding, sir, but I am not sure of the procedure. I know that they allocate certain funds to certain years, and accept application for them after the allocation has been made.

Mr. Whitney: That is all I want to ask on voir dire.

I object to it at the present time on the grounds there is no foundation.

The Court: It may be received.

Mr. Stanfield: No questions on voir dire.

Mr. Hays, I haven't even seen them yet.

Mr. Hays: I am sorry. I thought you said you had no objection (handing documents to counsel).

Mr. Stanfield: No objection.

The Court: They may be received.

The Clerk: Government's Exhibits 12-A through F in evidence.

(Said Documents were received in evidence and marked as Government's Exhibits 12-A through F.)

Mr. Hays: One final point, Mr. Kennedy.

(Testimony of Doyle S. Kennedy.)

Q. (By Mr. Hays): I hand you Government's Exhibit 1 in evidence, and ask you again to examine the entry pertaining [150] to 595. A. Yes, sir.

Q. And you previously stated that you had a conversation with Mr. Short regarding the entry there on 595, is that correct? A. Yes, sir.

Q. You were asked on voir dire the ownership indicated there on 595, and your answer was what?

A. Was Julian Woodruff.

Q. Calling your attention to the farm above, 594, what is the ownership indicated there?

A. I am sorry. I answered you incorrectly. The operator on 595 was shown as Julian Woodruff, and the owner as Kemper Marley.

Q. How about 594?

A. On 594 the name of the owner is Julian Woodruff, and Bill C. Burns.

Q. Did Mr. Short make any statements with regard to 594 and 595, and the fact that Mr. Woodruff is an owner on 594, and Mr. Kemper Marley is shown as an owner on 596?

A. Yes, sir. It comes back to me now.

This Mr. Short explained was the origin of the dummy farm that they had in processing the 1954 allotments, and this is all 1954. This listing sheet here, they had shown the wrong legal description on 595, and had later found [151] that it was not a farm at all, that it hadn't been a farm for some years, and it was at that point that instead of turning it back into the County and acknowledging the error, he decided that he would hold it as a reserve,

(Testimony of Doyle S. Kennedy.)

unbeknownst to the Committee Members, to make any adjustments that might be needed, if they had run out of reserve in making these adjustments or corrections.

Q. The confusion in the two names and the description resulted in the allotment to Farm 595 initially, is that correct?

A. Yes, and with regard to the name of Burns, he acknowledged that when he prepared the Lease which has been introduced in evidence here, signed by W. R. Burns, that he picked the name out of the air, but he might have been influenced by the fact that he saw this Bill C. Burns.

Q. On the farm up above?

A. That is right.

Mr. Hays: That is all.

Cross Examination

Q. (By Mr. Whitney): Mr. Kennedy, with reference to these exhibits concerning the ditch lining, I am handing you now Government's Exhibit 12 for identification, out of which some documents have been taken and introduced. [152]

I will ask you if you found that document in there (handing to witness)?

A. I am not sure whether this was in there or not. If it was in there now?

Q. It must have been.

A. No, sir, it probably was, but I have no way of knowing.

(Testimony of Doyle S. Kennedy.)

Q. You don't think I put it in there, do you?

A. No, sir. Neither did I.

Mr. Whitney: May I have this marked for identification?

The Clerk: Defendant's Exhibit G for identification.

(Said Document was marked for identification as Defendant's Exhibit G.)

Q. (By Mr. Whitney): Referring to Defendant's Exhibit G for identification, that is Government Form Number ACP-201, for request that the Federal Government share costs of needed conservation practices, is that right? A. Yes, sir.

Q. And on the face of that document, it shows that it refers to Farm 647 in Pinal County?

A. Yes, sir.

Q. And that is what we have been talking about here, the Neely farm? [153] A. Yes, sir.

Q. Now, then, this document was executed, was signed by the County Committeeman, was that name Elsberry? A. Elsberry.

Q. Elsberry. That is his signature?

A. It purports to be, and it looks like ones that I have seen of his, yes, sir.

Q. You would say it was his?

A. As far as I know.

Q. And that document is dated November 2nd, 1953?

A. That is the date of Mr. Neely's signature. There is no date opposite Mr. Elsberry's signature.

Q. That is the date Mr. Neely applied for this

(Testimony of Doyle S. Kennedy.)

concrete ditch lining, \$1500, in November 2nd, 1953?

A. Yes, sir. And it is marked "cancelled", as you see.

Q. I see that. I understand that you don't know whether Mr. Neely marked that cancelled, do you?

A. No, sir.

Q. You don't know that? A. No, sir.

Q. You don't know whose handwriting it is?

A. No.

Q. It is not yours? A. It is not mine.

Q. Nor mine? [154] A. Fine.

Mr. Whitney: Now, then, Mr. Clerk, I would like to have this marked for identification.

The Clerk: Defendant's Exhibit H for identification.

(Said Document was marked for identification as Defendant's Exhibit H.)

Q. (By Mr. Whitney): Mr. Kennedy, referring now to Defendant's Exhibit H for identification, which apparently is Form ACP-247, dated November 5, 1943, concrete ditch lining \$1500, signed by Joe L. Short. Is that Mr. Short's signature?

A. It appears to be.

Q. And that would indicate that Mr. Neely did apply for that practice in November, 1953?

A. I would assume so.

Q. All right. You know enough about the Government's agricultural business to know that they would apply the last part of 1953 for 1954 practices, wouldn't they?

A. That is my understanding, but I honestly

(Testimony of Doyle S. Kennedy.)

don't know exactly when, because different years when the funds are available, they may set different dates, and this shows——

Q. This shows it was for 1954 ACP?

A. This shows approved, which requires determination of need and practicability for 1954, and that's what this form is. [155]

Q. Legally, he could do that work on that ditch lining any time after November 3rd, 1953, and be within the law?

A. No, sir.

Q. Why not?

A. Because the law specifically provides that the performance of any part of the practice may not be begun until final approval is received.

Q. What is this?

A. That isn't final approval at all, as far as my understanding of it. This says "practice is tentatively approved."

Q. Mr. Neely is not a lawyer. He wouldn't know that, would he?

Mr. Holohan: I object to that as argumentative.

The Court: Sustained.

Q. (By Mr. Whitney): Have you got a form there where it is fully approved, as referred to here?

A. Yes. It is Form ACP-245.

Q. Have you got that file?

A. Yes, sir, Government's Exhibit 12-F in evidence is that form.

Q. Now, it is an approved practice, an application signed by Neely on November 27, 1954, for that same \$1500, for ditch lining?

(Testimony of Doyle S. Kennedy.)

A. That I am not prepared to say. It is the same, but this is certified by Neely that he has completed it on this date. [156]

Q. He had completed it before that date, hadn't he?

A. Yes, before that he applied for it, according to our investigation.

Q. And completed it between November 15th, 1953, and this date, he had completed it, you know that?

A. Our findings were that it was completed in the early part of 1954, yes, sir.

Q. It was completed sometime, as I understand from the tape recording you took from Mr. Neely, sometime between January and March of 1954?

A. In the early part of 1954, but I don't want to make it that I am testifying that this application which is dated November, 1953, is the application, because that is marked cancelled. There is a subsequent application.

Q. I know you wouldn't want to admit that.

Now, Mr. Kennedy, you have been testifying about what Mr. Short told you at different times?

A. Yes, sir.

Q. You took statements from Mr. Short, did you not?

A. I took one written statement from Mr. Short, and the remainder of our conferences were placed on a tape recorder, or used on tape recordings.

Q. And have you that statement?

Mr. Whitney: Will the Government produce that

(Testimony of Doyle S. Kennedy.)

written statement? I have what purported to be a copy, but [157] I don't know whether it is or not. Somebody gave it to me, and I didn't get it out of the Government files.

Mr. Hays: Just a moment. (Handing document to counsel).

Q. (By Mr. Whitney): I assume, Mr. Kennedy, that the tape recording was taken sometime after this statement from Mr. Short, which is dated apparently January 14, 1957?

A. The tape recording, we took a tape recording from which this statement was summarized, was drawn up. That was taken in the presence of Mr. Stanfield, Mr. Short, Special Agent Cardon, and me on January 10. I think you will find the statement is dated two or three days later. It took that long to get it typed up.

Q. You didn't take any tape recordings after this statement was made?

A. Yes, sir. Almost every time I talked with Mr. Short we had a tape recording.

Q. Reduced to writing?

A. No. They were not reduced to writing. I might add they were taken with their full knowledge and consent, however.

Q. Now, generally, with reference to Mr. Short's statement, didn't he tell you that he had accepted money from cotton producers in exchange for obtaining additional cotton allotments for them? [158]

A. Are you referring to this particular statement, or——

(Testimony of Doyle S. Kennedy.)

Q. Yes. A. Or the over-all?

Q. Yes.

A. Yes, he did. I can state that very definitely.

Q. Pardon? A. Yes, sir.

Q. And that was done quite frequently in that county, was it not? A. By Mr. Short?

Q. Yes.

A. In three instances that I know of.

Q. And what were those instances?

A. There was Mr. Neely was one. Mr. Ladd another. And Mr. Simmons another, all of whom paid Mr. Short money.

Q. Mr. Beggs or Mr. Haley didn't get any allotments from Mr. Short?

A. He didn't pay any money to Mr. Short.

Q. Did he get any allotments from him without paying any money?

A. Mr. Short didn't acknowledge it if he did.

Q. From the examination of the records, did you discover they did that?

A. We discovered various irregularities, Mr. Whitney, with respect to allotments, which are to the operation of the [159] office. We were making an investigation of the entire operation of the Pinal County Office.

Q. And you found, Mr. Kennedy, I assume, that that office was very loosely run, wasn't it?

A. No, sir, I wouldn't say it was very loosely run. We found some examples of——

Q. You found a lot of irregularities there?

A. Well, considering that there were around a

(Testimony of Doyle S. Kennedy.)

thousand farms, there were relatively few that we found that there were irregularities in.

Q. And you found, I assume, that there were a lot of farmers in Pinal County who did business in this office in Casa Grande that had overplanted over and above their allotment for the years 1954, 1955, and 1956?

A. Yes, they had overplanted, but in nearly every instance they had destroyed their cotton, or paid the penalty on it.

Q. We will get at that in a moment. It isn't against the law to overplant, is it?

A. No, sir, it isn't.

Q. And it isn't against the law to not plow it up, is it?

A. No, sir, not if you pay the penalty on it.

Q. As long as you pay the penalty?

A. That's right.

Q. And when the Government finds that a man has overplanted, [160] and knows of his overplant, and knows what his overplant is, they send out a notice of overplanting, do they not?

A. That is the procedure. They normally send the notice out. Mr. Short, in my conversations with him, indicated that he felt it was equally as proper to notify them orally if they were in the office, that they were overplanted.

Q. Well, the ordinary procedure would be to send a notice?

A. That was the normal thing to do, yes.

Q. And if the grower failed to plow up the ex-

(Testimony of Doyle S. Kennedy.)

cess cotton he had planted, then he was assessed the penalty, is that right?

A. The grower, the notice that is sent out provides that it must be destroyed within twenty days, or the penalty will then be assessed, yes, sir.

Q. And if it isn't destroyed within the twenty days, the Government of course checks on the farm and send out the notice of the penalty, is that right?

A. If it is not destroyed within twenty days, it is then remeasured sometimes, to be sure.

Q. That's right.

A. And then the penalty is assessed for the excess acreage.

Q. That penalty amounts to around about, at that time, about seventeen cents a pound, or maybe a little better? [161]

A. Yes, sir, it was about fifty percent of the market price.

Q. And all the farmer that had overplanted would have to do then when he got his notice of the penalty was to write out a check to the Treasurer of the United States, and the matter would be closed, isn't that right?

A. Well, I would assume if he paid his penalty, the matter would be closed, for the amount assessed him, but there were certain procedures gone through with before they even sent his notice of penalty.

Q. You know, do you not, that Mr. Neely got a notice for overplant on his Maricopa County farm, and had paid the penalty after investigation?

A. I didn't investigate that part, but that is my

(Testimony of Doyle S. Kennedy.)

understanding, that Mr. Neely had during one year at least paid some penalty in Maricopa County.

Q. Have you any idea that if Mr. Neely had been sent a notice of his overplant, and had failed to destroy his cotton, and had been sent another notice for the excess, he would not have paid it?

A. I can't answer that.

Mr. Holohan: I object to that as pure speculation.

The Court: He can't answer that.

We will suspend until two o'clock. Keep in mind the Court's admonition.

(The noon recess was taken.) [162]

Afternoon Session

Thursday, September 11, 1958

Two O'Clock P.M.

Court resumed pursuant to recess.

Appearances: Same as before.

The Court: You may continue.

DOYLE S. KENNEDY

resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Whitney): Mr. Kennedy, before we go back into Mr. Short's statement, which the United States Attorney so kindly let me have, I would like to ask you questions about that penalty.

I am referring now to the 1956 overplant, if any.

Do you know, as a matter of fact, that the penalty

(Testimony of Doyle S. Kennedy.)

against Mr. Neely for overplanting in Pinal County for the year 1956 had already been **made up in the** County Office at Casa Grande?

A. Do I know as a matter of fact whether or not it had?

Q. Yes. A. No, sir, I do not.

Q. Did you make any investigation to determine whether [163] it had?

A. My recollection is that they had tentatively discussed the overplant, but I don't recall that the penalty actually had been computed.

Q. You were not in the courtroom when Mr. Wolfe testified, were you? A. No, sir, I was not.

Q. Do you know whether or not the State office, or you or Mr. Johnson, the government investigators, had this penalty held up?

A. Yes, sir, I do know that there was some discussion as to whether or not the payment of a penalty at that time would have any effect on the cases coming up, and it was decided to withhold, if I am not mistaken, the demand for the penalty until such time as this case was completed. I believe I am right on that.

Q. But you know, or do you, as late as October 1, 1957, forms were sent to Mr. Neely by Mr. Elsberry of the office at Casa Grande, or a statement as to the plantings for different years, so they could determine the plant penalty, or did you know that?

A. I knew that a series of these people were involved in cases similar to this, and had been sent

(Testimony of Doyle S. Kennedy.)

—were requested to supply information regarding their crops, I believe from 1950 or 1951, on to date. That is a procedure I think that [164] is authorized by the regulations.

Q. And that procedure was gone through for the purpose of determining the penalty?

A. Well, it would appear so, but I can't say positively that it was.

Q. I see. And, of course, did you know that Mr. Neely did not fill those out because it was after the indictment had been returned in this case?

Mr. Holohan: I object to all this as immaterial.

The Court: If the witness knows, he may answer.

Q. (By Mr. Whitney): Do you know that?

A. No, sir, I don't know that.

Q. Referring to Defendant's Exhibit F for identification, which purports to be a letter of October 11, 1957, from Mr. Elsberry, in which he enclosed Form MQ-98, Upland Cotton Production.

A. Yes, 98 is correct.

Q. And that is Mr. Elsberry's writing?

A. As far as I know, it is, yes.

Q. You are somewhat acquainted with his writing?

A. I have seen it before, yes.

Q. Those are the forms that I have reference to?

A. Yes, sir.

Q. Now, you stated, I believe, that you don't know as a matter of fact whether the penalty against Mr. Neely for [165] overplanting in 1956 has actually been made up?

A. As a matter of fact, no, sir, I don't recall.

(Testimony of Doyle S. Kennedy.)

Q. You don't recall ever seeing it?

A. I don't remember.

Mr. Whitney: I will ask Mr. Hays if you have got such in your files.

Mr. Hays: No, I have no information in regard to the penalty in the files.

Q. (By Mr. Whitney): Now, with reference to the lease that has been introduced in evidence here, which it now determines probably is, as far as the Government is concerned a phony lease; referring to Government's Exhibit 15 in evidence, where did you get that?

A. This was turned over to me and Special Agent Johnson by Mr. Neely at his home in Chandler.

Q. He turned over that and all of his Marketing Cards that he had, and his cotton allotments for 1954, 1955, and 1956?

A. As I recall, he turned this over, cotton allotment notices, for '54, '55, and '56, and I don't believe he had any Marketing Cards, or if he did, he didn't have a complete set of them.

Q. I see.

A. And he authorized us to get the cancelled checks that are in evidence. [166]

Q. And he fully cooperated with you?

A. Yes, sir.

Q. What did he tell you about that lease?

A. In what respect, sir?

Q. About how he came to get it.

A. He stated that he wanted to get some extra

(Testimony of Doyle S. Kennedy.)

allotment for 1954 crop, and that he contacted Joe Short, and Short indicated he might be able to get some for him.

Subsequently, Short presented him with the lease, and indicated that that represented surplus cotton allotment.

Q. Did he also tell you that prior to the time that he got this lease that he gave Mr. Short a check for \$1,620 dated on March 20, 1954?

A. There was some discussion with respect to Mr. Neely's payment for the 1954 allotment.

As to a check on which he had stopped payment. Now, I didn't see that check. He did acknowledge that he gave——

Q. That he gave that check?

A. That he gave a check which he identified, I believe it is dated April 5th.

Q. Fifth?

A. April 4th or 5th, but he was unable to recall the circumstances which caused him to stop payment on the first check, and then reissue in effect the check a few days later.

Q. Can I refresh your memory on that, if you remember it? [167] A. Yes.

Q. Did Mr. Short tell you that he gave Mr. Neely a check for \$1620 for 81 acres allotment on the Burns lease, and that he had talked it over with his brothers and the Valley National Bank manager at Mesa, and that they told him he had better get a lease, and not take anybody's word for it?

Do you remember anything like that?

(Testimony of Doyle S. Kennedy.)

A. I think you said did Mr. Short tell me that? Would you mind reading the beginning of the question back.

Mr. Whitney: Read the question.

(The last question was read.)

The Witness: You mean did Mr. Neely tell me this?

Q. (By Mr. Whitney): Yes.

A. My recollection on that is rather vague. There was some discussion with respect to first giving a check, and then at the time he talked with me, as I recall, he couldn't remember exactly why he stopped payment on the check, but that subsequently he said that it looked like it was all right, so he gave another check.

Q. After he had gotten this lease?

A. Well, I believe the lease is dated March 30th.

Q. March 30th. And the check was dated April 4th or 5th? A. Yes.

Q. That's right. And that check I am referring to now [168] is in evidence as Government's Exhibit 14-A, \$1620, dated April 5th, 1954?

A. Yes, sir.

Q. And you are sure he didn't show you any check where the payment had been stopped?

A. I don't recall it. And as a matter of fact, he had no checks. He said his accountant had the checks, and we got those later from the accountant.

Q. Did you see a check on which payment was stopped?

(Testimony of Doyle S. Kennedy.)

A. I have never seen a check on which payment was stopped, no, sir.

Q. Did Mr. Neely tell you that he knew that this lease was in any way phoney? A. No, sir.

Q. In other words, in his conversation with you, he thought this was a legitimate lease, didn't he?

A. That was the impression I got, yes, sir.

Mr. Whitney: Now, Mr. Hays, have you got the notes of farm acreage allotment for 1954, the three of them that Mr. Neely gave Mr. Johnson, or Mr. Kennedy? One of them may be in evidence.

Mr. Hays: What do you mean, the notes?

The Witness: The photostats.

Mr. Hays: You mean notices?

Mr. Whitney: Yes. [169]

Q. (By Mr. Whitney): Referring to Government's Exhibit 17-A for identification, which apparently is a Notice mailed Mr. Neely on Form MQ-24, Notice of Farm Acreage Allotment, Marketing Quota for the 1954 Crop of Upland Cotton. That shows signed by Mr. Elsberry for 252.2 acres.

Was that the correct allotment at that time?

A. I would have to look at the Listing Sheet, but this looks——

Q. I don't want to take up all this time.

A. I am not trying to evade you.

Q. I know. A. May I see the other?

Q. Yes. A. Are they for different years?

Q. No, all for 1954.

A. This appears to be the original allotment that was sent out for that year, yes, sir.

(Testimony of Doyle S. Kennedy.)

Q. Now, referring to Government's Exhibit 17-B for identification, which was also signed by Mr. Elsberry, and dated, this first one was dated 12/11/53. This was 2/16/54, which shows a previous allotment notice of 12/11/53. This shows 319.8 acres.

Can you tell me what caused that second notice to be sent out?

A. It appears to be a revision in the allotment, [170] Mr. Whitney.

Q. Now, to refresh your memory, and maybe I am incorrect about this, I can't keep up with the Government, but didn't Congress pass an act about that time in which they increased the allotment?

A. Yes, sir, that was what I was referring to.

Q. And they increased the allotment to the State, and the State in turn increased the allotment to the County, and then the counties refigured the allotments and added it to what the farmer was supposed to have?

A. My understanding is they revised the allotments upward, because they got this extra acreage, and this apparently is the result of that investigation.

Q. There is nothing wrong with those two allotments, is there?

A. As far as I know, there isn't.

Q. All right, referring to Government's Exhibit 17-C in evidence, which is signed by Henry D. Haley, for the Pinal County Committee, which showed a previous notice of 2/16/54, this was dated 3/19/54, for 400.8 acres.

(Testimony of Doyle S. Kennedy.)

Do you know how that came to be raised that amount?

A. Yes, sir. These are a series of three allotment notices, the last of which is 400.8 acres, and I believe as I testified this morning, that was increased under this released acreage surrendered by this dummy farm 595. [171]

Q. Covered supposedly by the Burns lease?

A. It shows on the Listing Sheet as being released acreage, and that is the basis for this allotment notice.

Q. In other words, that 81 acres added to this notice of 319.8 exactly means, or makes it 400.8?

A. 81 and that amount make 400.8.

Q. Assuming that that lease there that we have been talking about or discussing was a bona fide lease—we know now that it isn't, but assuming that is a bona fide lease, there would be nothing wrong with that allotment of 400.8?

A. That would be something that the County Committee would have to pass on.

Q. And if they passed on it and allowed it?

A. Then that is within their discretion.

Q. That is within their discretion. Now, then, you know that allotment was transferred quite frequently down there in Pinal County from farm to farm? Somebody didn't have enough water to plant his cotton, or somebody else had some reason for not using his allotment?

A. What year are we referring to?

Q. 1954.

(Testimony of Doyle S. Kennedy.)

A. 1954, I know that under this release and re-apportionment procedure used by that County, that there were several transfers of allotment, yes, sir.

Q. And there was nothing wrong with those?

A. That I can't pass on.

Q. But you don't know of anything wrong?

A. I know there is no other county that used that procedure, to my understanding, and that Pinal County was prohibited from using it after 1954.

Q. Now, did Mr. Neely tell you that he was required to give Mr. Burns a sublease back for this same acreage, that there was the statement in it, "Lessee to have the right to plant any crop he desires on the premises except cotton."

Did he call that to your attention?

A. He told me he didn't even know Mr. Burns, and he never called that to my attention. He never heard of it before.

Mr. Whitney: Will you mark this for identification.

The Clerk: Defendant's Exhibit I for identification.

(Said Sublease was marked as Defendant's Exhibit I for identification.)

Q. (By Mr. Whitney): Showing you Defendant's Exhibit I for identification, you have never seen that before? It purports to be a copy of a sublease.

A. No, I have never seen this before.

Q. Is that the same description as the Burns and?

(Testimony of Doyle S. Kennedy.)

A. Let me see. It is the Northwest Quarter of Section 3, Township 6, Range 7 East. [173]

Q. It is the same thing, but you have never heard of that before? A. No, sir.

Q. Now, did you have occasion to examine during your investigation what was referred to in the other trials as the Control Register, but in this case it is referred to as Defendant's Exhibits A and B for identification?

A. I have examined that, yes, sir.

Q. And you found in no control register quite considerable overplanting in that county by various and diverse farmers?

A. I found the record was quite incomplete, to begin with, and in several, if I may go ahead, that appeared to be overplanted, by examining the folders for the particular farms we found the cotton had been destroyed.

Q. And this form did show that cotton was destroyed on various farms?

A. Ask the question again, sir.

Q. Did various farms here show that cotton was overplanted, and the excess had been destroyed?

A. In some entries there, yes, sir.

Q. In some of those entries, it also showed that they still got their Marketing Cards?

A. After they had destroyed the cotton?

Q. Yes. A. Yes, sir. [174]

Q. And without having actually destroyed it?

A. Well, that I can't say.

(Testimony of Doyle S. Kennedy.)

Q. Now, Mr. Kennedy, referring to Defendant's Exhibit D for identification, which is a copy of the document that is on the bulletin board down here at Casa Grande that I had Mr. Davis make me a copy of, have you ever seen that?

A. I saw it on the bulletin board down there the other day for the first time.

Q. Who authorized putting out that document?

A. That I couldn't answer, because I don't know.

Q. You will note there that the measurements will be handled in a different manner than previously handled, and so forth. In other words, it changed the methods of measurement?

A. Yes, so it says there. I am not familiar with their present methods of measurement.

Q. Now, Mr. Kennedy——

Mr. Whitney: First, I would like to have this marked as an exhibit for identification.

The Clerk: Defendant's Exhibit J for identification.

(Said Statement was marked as Defendant's Exhibit J for identification.)

Q. (By Mr. Whitney): I believe you have stated that you took a statement from Mr. Short, Joe L. Short, on or about [175] the 14th day of January, 1957?

A. Yes, sir.

Q. And in that statement, Mr. Short completely exonerated Mr. Neely?

A. I didn't state that.

Q. You didn't say that, but I say in that statement didn't he say that Mr. Short——

(Testimony of Doyle S. Kennedy.)

Mr. Holohan: I object to that. The statement is the best evidence of what he said.

The Court: I think so.

Mr. Whitney: Very well. I imagine that is correct.

Q. (By Mr. Whitney): That is Mr. Short's signature?

A. This is the original of the statement. That is my signature there, and Mr. Stanfield's, Mr. Cardon's, the other Special Agent, and Mr. Short. Yes, sir.

Mr. Hays: We have no objection to its admission in evidence, Mr. Whitney, if you want to put it in evidence.

Mr. Whitney: We offer it.

The Court: It may be received.

The Clerk: Defendant's Exhibit J in evidence.

(Said Statement was received in evidence and marked as Defendant's Exhibit J.)

Q. (By Mr. Whitney): Mr. Kennedy, in this statement I notice it says: [176]

"During each of the three crop seasons mentioned, that is to say, 1954, 1955, and '56, I accepted money from cotton producers in exchange for obtaining additional cotton allotments for them. I led these producers to believe that I obtained such allotments either from my own farm, or through a deal with other producers who had allotments which were unplanted. They trusted me, and insofar as I know, they believed my representation."

(Testimony of Doyle S. Kennedy.)

That was part of the statement that Mr. Short made? A. Yes, sir.

Q. Now, this morning I believe you made a statement about how these penalty notices were sent out.

Mr. Whitney: I would like to have this document marked for identification.

The Clerk: Defendant's Exhibit K for identification.

(Said Letter, 9/12/55, was marked as Defendant's Exhibit K for identification.)

Q. (By Mr. Whitney): Showing you Defendant's Exhibit K for identification, which purports to be Notice with reference to excess cotton acreage for some farm had by Mr. Neely in Maricopa County, that is what you were talking about, where they said 17.7 cents a pound? [177]

A. This appears to be a notice of penalty of 17.7 cents, yes, sir, if the cotton is not destroyed.

Mr. Whitney: That is right. We offer this.

Mr. Holohan: We object to the document. It deals with the year 1955 in Maricopa County.

The Court: All right, objection sustained.

Mr. Whitney: Will you mark this.

The Clerk: Defendant's Exhibit L for identification.

Mr. Holohan: We have no objection to any so-called payment of penalty, if that is the next check you were going to offer.

Mr. Whitney: Well, without the other——

Mr. Holohan: You don't need a foundation, if we don't object to it.

(Testimony of Doyle S. Kennedy.)

Mr. Whitney: You mean you have no objection to Defendant's Exhibit L, the payment of the penalty of Maricopa County?

Mr. Holohan: We have no objection.

The Clerk: Defendant's Exhibit L in evidence.

(Said Check was received in evidence and marked as Defendant's Exhibit L.)

Q. (By Mr. Whitney): Of course, Mr. Kennedy, I don't suppose that you could connect this up in any way, Defendant's Exhibit L in evidence, with K in evidence? [178]

A. Inasmuch as I haven't even been to the Maricopa County Office, and this pertains strictly to Maricopa County, I am afraid I couldn't.

Mr. Whitney: Would you mark this for identification.

The Clerk: Defendant's Exhibit M for identification.

Q. (By Mr. Whitney): Referring, Mr. Kennedy, to Defendant's Exhibit M for identification, this is the check that I asked you about that you didn't think you saw. I am asking you now if that doesn't refresh your memory. Maybe it doesn't. I don't know whether you saw it or not.

A. This is a check dated March 20, 1954, for \$1,620, payable to Joe Short, signed by Neely, with the payment stopped on it.

No, sir, I have never seen that check.

Q. That check was apparently made out prior to the lease of March 30th?

A. It carries an earlier date.

(Testimony of Doyle S. Kennedy.)

Q. And the lease carries an earlier date by five days of the other check for \$1,620.

Do you remember, Mr. Kennedy, with reference to the 1955 cotton crop of Mr. Neely in Pinal County, of Mr. Short telling you that he got \$10 from Mr. Neely, which was the fee for measurement, and went out to Mr. Neely's farm?

A. I remember Mr. Short stated that Mr. Neely had paid [179] the \$10 fee for measurement of destroyed cotton, and that he was supposed to go out there now. I am not sure whether he even went out, or not.

Q. Now, you talked to a lot of the farmers about Mr. Short, haven't you?

A. Not so many, no, sir.

Q. You don't know whether he was rather a tough administrator in that office, or not?

A. I am not in a position to judge that, sir.

Mr. Whitney: I think that is all.

Cross Examination

Q. (By Mr. Stanfield): Mr. Kennedy, you remember the circumstances of the taking of this statement? A. Yes, sir, I do.

Q. And do you remember that you and I and Mr. Short, and this other gentleman, I think his name is—— A. Mr. Cardon.

Q. Cardon? A. Reed Cardon, yes, sir.

Q. And you had a recording machine there, a tape recorder, did you not? A. Yes, sir. [180]

(Testimony of Doyle S. Kennedy.)

Q. And that the words contained in this Statement are not those on the tape?

A. They are a summary of the tape. The tape runs, as I recall, for around two hours.

Q. And these are a condensation from that tape?

A. Yes, sir.

Q. Do you happen to know who condensed it?

A. Yes. I did.

Q. All by yourself, or did Mr. Cardon help you?

A. I think I did most of it myself.

Q. There were some other tapes taken, weren't there, Mr. Kennedy?

A. Subsequent to that time, every interview that I had with Mr. Short, with the exception of maybe one or two very short ones, were all taken on tape, and that includes interviews, not only with respect to Mr. Neely, but also with regard to other irregularities, taken at our office.

Q. Did you take any statements out at Mr. Short's house?

A. Any written statement?

Q. Any in which you used the machine?

A. Not that I recall.

Q. Aside from that taken in my office, you took all of the other tapes down at the ASC Office in Casa Grande?

A. In a little private office in the back, yes, sir.

Q. You never reduced those to writing, did you, Mr. Kennedy? [181]

A. No, sir.

Q. Why was that?

A. As a matter of fact, you will recall that I think Mr. Short said he wouldn't sign any more

(Testimony of Doyle S. Kennedy.)

statements. That was in your presence, I think, Mr. Stanfield, at the time we took that statement.

Q. My recollection is different. Didn't you in fact say that he wouldn't sign anything along this line unless I had looked at it?

A. He may have.

Q. The fact remains somebody reduced the others to writing? A. No, sir.

Q. Condensed or otherwise? A. No, sir.

Q. You have no independent recollection of asking him if he would sign other statements, have you? A. No, I don't.

Q. Then aside from that fact, is there any reason why you did not reduce the others to writing?

A. They ran into hours and hours and hours of comment, and going over the same things more than once.

It was not reduced to writing, because we felt, or I felt that that original statement there covered the broad outline of the irregularities. [182]

Q. In preparation of this trial, you have refreshed your memory as to those statements, have you not?

A. Oh, yes, if you mean have I listened to the tapes; yes, I have.

Q. You listened to all of the tapes in preparation for this case, have you not? A. Yes, sir.

Q. Did you prepare notes from which to testify as to the statements that Mr. Short made that you have referred to in your direct testimony?

(Testimony of Doyle S. Kennedy.)

A. No, sir. I mean, will you rephrase the question? I am not sure I understood it.

Q. You have conceded that you have listened to the tapes? A. Yes.

Q. What I want to know, did you make any notes from the tape or tapes?

A. At the time I have listened to them in preparation for this?

Q. To prepare yourself for testimony on direct.

A. No, sir.

Q. The reason I ask that is because you made some specific references to terms that I did not recall, and I want to ask you some questions about that. A. All right, sir. [183]

Q. Before I get into that, I would like to talk to you about the Farm 595.

Isn't it a fact that in your investigation, there was an indication that 595 had existed prior to 1954?

A. Do you mean the property that, or which is legally described now as Farm 595 had existed as what? As a farm?

Q. We know it existed as land.

A. Yes.

Q. Because we have heard testimony on that.

A. Right.

Q. Then obviously I mean farm. Did it exist as a farm before 1954?

A. My understanding was, and what I found out during the investigation, that in the late 1940's, probably as late as maybe 1950, it was operated

(Testimony of Doyle S. Kennedy.)

as some kind of a farm, and there was some cotton grown on it, but since 1950, it had been in effect abandoned, and it had more or less gone back to desert.

Q. As to the assigning of cotton allotment to 595 for the year 1954, that would have happened in 1953, wouldn't it?

A. The Listing Sheets would have been made up in the latter part of 1953, yes, sir.

Q. And the allotment assigned to it at that time?

A. Yes, sir.

Q. And has everything you have seen so far from your [184] investigation been to the effect that Mr. Short is the person who assigned the allotment to it, or do you know?

A. Well, I am not sure I understand your question. I can tell it in my own words, if I may.

Q. I will rephrase the question.

A. All right.

Q. You stated earlier, I don't know what the exhibit was that contained it, there was a history for the years 1951, '52, and '53, established on this farm 595.

A. I stated that this form purported to show a history for that farm.

Q. That is the one Mr. Short——

A. That is the one Mr. Short made up.

Q. It shows W. R. Burns as the operator?

A. Yes, sir.

Q. Once again handing you Government's Ex-

(Testimony of Doyle S. Kennedy.)

hibit 1 in evidence, would you locate Farm 595 on there again? A. Yes.

Q. Do you know offhand when that would have been prepared, that listing on there?

A. The sheet normally is prepared, and it is dated December 10, 1953, when it was listed and computed, so it would have been around the latter part of 1953.

Q. This sheet also shows who prepared it, does it not?

A. It shows it is listed by, and it is signed by both [185] Mr. Short and Mr. Wolfe, as being listed, computed, and checked by them.

Q. Who has approved it, if anyone?

A. The County Committee approvals show the name of Elsberry, Beggs, and I am unable to read this last one.

It looks like Hamilton, but I am not sure.

Q. And the State Office people have also?

A. Yes, sir.

Q. Unless this particular exhibit is completely wrong, quite a few people participated in getting the allotment on 595 going for 1954, isn't that right?

A. Those signatures are usual on all Listing Sheets.

Q. In reference to the Farm 595, did you have occasion to search the records down there in the office for a file folder with an old number, but the same farm on it?

A. With an old number?

Q. Let me rephrase that question. Weren't you

(Testimony of Doyle S. Kennedy.)

given information that Farm 595 had existed before 1954 under another number?

A. Not that I recall. You may be referring to the fact that Mr. Short's explanation to me was that because of an error in legal description, 595 first had come into existence on this listing sheet.

595 is the northwest quarter of Section 3, and erroneously they had shown this as a farm, when they intended [186] and corrected 594, which I believe is the southwest quarter. That's Mr. Short's explanation to me as to why there was a 595 in the first place.

Q. And you have no reason to question that at this time, have you? A. No.

Q. You stated that in one of your conversations with Mr. Short that he stated, correct me if I am wrong, that Mr. Neely had destroyed his cotton, that is, the overplanted cotton?

Did you make that statement earlier? I assume that would be for the years 1955 and 1956.

A. He stated that Mr. Neely had destroyed his cotton, is that your question?

Q. Yes.

A. I would have to know which year.

Q. I think you misunderstood my question here, so I will ask this one. A. All right.

Q. As to the overplant in 1955, did Mr. Short here tell you that he had not plowed up any cotton, for Neely?

A. I believe I testified this morning that Mr. Short said at the time he put the "destroyed" fig-

(Testimony of Doyle S. Kennedy.)

ures on there, the cotton had not been destroyed. If I am not mistaken, the date was August 18, 1955.

Q. Do you remember exactly when you had that conversation?

A. No, I am sorry I don't. It was either in February or March, I would judge. And I talked with Mr. Short quite a number of times.

Q. Was that on the tape, do you know?

A. I am quite certain it is, yes.

Q. Didn't you subsequently learn some cotton had been plowed up following that time?

A. Mr. Short indicated that he later had inspected the field, and his recollection was around 50 acres was destroyed.

I then questioned Mr. Short why he got just this \$10 fee when the fees were on a sliding basis. The more acreage that was destroyed, the more was charged to go out and measure it. Mr. Short testified along with the 50 acres he thought were destroyed, he hadn't measured it, he had driven out there, I believe, but that was subsequent to the date Mr. Neely signed it, that was my understanding of it, and along that same line Mr. Neely stated to me and Mr. Johnson that he had destroyed about 15 acres.

The overplanting was in excess of 100 acres, if I am not mistaken.

Q. I think I understand you. You stated on direct examination, I believe, that you had investigated the [188] activities of the ASC Office in Pinal County, that is correct, isn't it?

(Testimony of Doyle S. Kennedy.)

A. I stated that, yes, that our investigation was concerned with irregularities, or apparent irregularities in the Pinal County Office, yes, sir.

Q. And you presumably investigated all of the various programs that were handled there, for irregularities?

A. Well, I personally may not have. There were four of us down here at one time, four special agents working on various phases of it.

Q. Does that mean you did or didn't?

A. Well, I would have to know which program you mean.

Q. What did you personally investigate?

A. Well, I personally investigated anything the three growers, where I was on the investigation of the three growers, Mr. Neely being one, who had paid Joe for securing additional cotton acreage allotments.

Also, I checked on the matter of the Country Club, who had, as you may recall, auctioned off their allotment.

Q. Let me interrupt you. Then you did not actually investigate the office. You went down, and you had certain specific cases you were going to investigate, and that is all you investigated?

A. No, we investigated—we went into the office with the allegations that irregularities had occurred. [189] We made a cursory examination on the various programs, and where it appeared there might be irregularities, we went further, and these cases developed out of that.

(Testimony of Doyle S. Kennedy.)

Q. Once again, you weren't looking blindly, were you?

A. No. We were not investigating every program for every farmer handled by the County Office for the last three years.

Q. Wouldn't you say, in fact, that of the various crops and farmers programs, more than 90 percent were never even looked at by you, or any of your people?

A. If you mean that the farms we didn't look at——

Q. I mean of the transactions that occurred, that the vast majority was untouched by United States investigation?

A. For a thorough investigation, yes, sir.

Q. You don't know personally, as a matter of fact, whether the rest of them were proper or improper, do you?

A. The only thing I could testify to that personally knowing is with respect to the ones that I made a complete investigation on, or was a member of the team that made the investigation.

Q. But by and large, your investigation did show that the office was actually a very well run office, didn't it?

A. For the volume that was handled by the office, I would say that it was in pretty fair shape; yes, sir.

Q. You live in San Francisco, don't you? [190]

A. In that area, yes, sir.

(Testimony of Doyle S. Kennedy.)

Q. How long have you been a Compliance Investigator?

A. I have been with the Department of Agriculture about five years in this capacity.

Q. Prior to that, what was your field?

A. I was with the United States Department of Labor in an investigatory capacity for about 15 years.

Q. Do you have F.B.I. training, or something like that?

A. No, sir.

Q. How often have you investigated agricultural problems on a county level?

A. Oh, I would say during the five years I have been with the department, you must understand that there were many other problems than cotton in various areas. We cover nine states. I would say 50 percent of my assignments have necessitated my checking in with the various county offices for some information or check of their records.

Q. How often has this 50 percent concerned cotton?

A. Well, this is my first experience with cotton in this manner here.

Q. In other words, prior to your participation in this investigation, you knew nothing more than an average employee would know about allotments and rules?

A. That is correct.

Q. To what extent have you familiarized yourself with [191] the rules as provided by the Secretary of Agriculture, as far as cotton program is concerned?

(Testimony of Doyle S. Kennedy.)

Mr. Holohan: At this time we would like to interpose an objection. We don't see the materiality of this.

The Court: The Court has to take judicial notice of those regulations.

We will suspend at this point until tomorrow morning at ten o'clock.

Keep in mind the Court's admonition.

(Thereupon an adjournment was taken to the following day, Friday, September 12, 1958, at the hour of ten o'clock a.m.) [192]

Friday, September 12, 1958

Ten O'Clock A.M.

The Court: You may continue, gentlemen.

DOYLE S. KENNEDY

resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Stanfield): Mr. Kennedy, you stated I believe earlier that you had conversation with Mr. Short in connection with his job [193] there as office manager on numerous occasions, did you not?

A. Yes, sir.

Q. And part of which you tape recorded, and a part of which you did not? A. Yes, sir.

Q. During these various conversations, you had occasion to ask Mr. Short to point out various entries in a number of the records there at the office, did you not? A. Yes.

(Testimony of Doyle S. Kennedy.)

Q. As a matter of fact, you had him explain many of the entries, did you not? A. Yes.

Q. I don't remember whether it was the occasion of your visit to my office or not, but on one of the occasions you told Mr. Short to produce his bank statements and checks, did you not?

A. Yes, sir.

Q. And he did give you those items, didn't he?

A. He gave me most of them. Some he explained were withdrawn from his regular statements for income tax purposes for the return that he had made up.

Q. Did you subsequently get those?

A. Some, not all.

Q. And you also received a letter from him authorizing his bank to give you his records, their records in connection [195] with his banking activities there? A. Yes, sir, I did.

Q. That was the Valley National Bank in Casa Grande, Arizona, right? A. Yes.

Q. And, in fact, since the very beginning, the first conversation you had with Mr. Short, which was in November, I believe, of 1956, until the investigation was closed, if it is, he has cooperated with you in every respect as to statements, furnishing you with material, explanations, and what-not, isn't that correct? A. That is correct.

Mr. Stanfield: I beg the Court's indulgence while I locate an exhibit, Defendant's Exhibit J, the Statement.

Q. (By Mr. Stanfield): I hand you again De-

(Testimony of Doyle S. Kennedy.)

fendant's Exhibit J in evidence. That is the statement that Mr. Short signed back in January, 1957, isn't it? A. Yes, sir.

Q. Isn't it a fact that everything he has told you in connection with this statement that you have set down in writing, as well as the other statements, has been consistent since the very beginning, and has never changed?

A. Yes, sir. He has added details from time to time, but there has been no abrupt change in his statements.

Q. Now, calling your attention again briefly to the [195] statements you made earlier, that Mr. Short had admitted to his having forged the name of Doyle Dunkin on one of the Government's exhibits; do you remember the circumstances of the conversation in which this alleged admission was made? A. Yes, sir, I think I do.

Q. It occurred at the office, the ASC Office in Casa Grande? A. Yes, sir.

Q. Now, isn't it a fact that the occasion surrounding that particular signature or signatures involved something over an hour of discussion between you and Mr. Short, and possibly Mr. Johnson?

A. Yes, Special Agent Johnson was present also, but there were two conversations, Mr. Stanfield, some days apart.

Mr. Whitney: Who did you say was present also?

The Witness: Special Agent Johnson.

(Testimony of Doyle S. Kennedy.)

Q. (By Mr. Stanfield): Did they both occur at the same place?

A. They were both at the ASC Office, yes, sir, to the best of my recollection.

Q. Well, how far apart in time were they?

A. Oh, probably a week.

Q. Did Mr. Short make the same statement regarding the signatures at both times?

A. No, sir, the first time he was—he stated that [196] he didn't know whether it was his signature or not.

Q. And didn't he advance several theories as to the signature on both occasions?

A. Well, I am afraid I can't answer that. What do you mean by "theories"?

Q. Didn't he say that he couldn't remember having signed that name on those instruments?

A. He did the first time, yes, sir.

Q. And didn't he further state that he might have, but that he didn't remember? Didn't he say that?

A. My recollection is during the first conversation with him, he had first said he didn't remember signing it, but that he might have signed it.

Q. With respect to the ACP matter, I hand you Government's Exhibit 12-F, which I believe has been admitted, and ask you if you notice some initials in red ink down to the right side of that page?

A. Yes, sir, I do.

Q. Do you know whose initials those are, Mr. Kennedy?

(Testimony of Doyle S. Kennedy.)

A. I have been told that the initials are P.B.H., and the date is 9/25/54, I have been told, and I believe by Mr. Short, that these were Paul B. Hanna's, initials of a former employee of the office at that time.

Q. You were likewise informed that he had performed the calculations on this paper? [197]

A. I don't recall being informed that he performed those specific calculations. I believe his duties were in connection with clerical work.

Q. You have no reason to doubt that he did the work, have you? I am talking about Mr. Hanna?

A. I have no reason to doubt, no, sir.

Q. Have you discussed that matter with Mr. Hanna at any time?

A. I don't think that I have. I don't recall doing it at all.

Q. Is there any particular reason why? Was he unavailable?

A. I am under the impression he was unavailable. Also as to reason. It appeared to have no particular significance, those initials on there.

Q. Now, you knew from one way or another that Mr. Hanna was handling the ACP for the office during this particular time?

A. I was told by Mr. Short that Mr. Hanna handled the ACP clerical duties, yes, sir.

Q. And that Mr. Hanna would have been familiar with the forms in the various ACP files, wouldn't he, if he had been handling ACP?

A. It would seem logical, yes.

(Testimony of Doyle S. Kennedy.)

Q. And it likewise would have seemed likely that you [198] would have asked him about this particular file, wouldn't it?

A. No, sir, not from this standpoint. What you showed me there is simply the application for payment signed by Mr. Neely, form 245. Our questions were in connection with the signature of Doyle Dunkin.

Q. If Mr. Hanna were in charge of that program for that year, he would have had this file in his custody during this period of time, wouldn't he?

A. I was not informed he was in charge of the program. Mr. Short was in charge of the operations of the office, and he informed me Mr. Hanna was one of his clerical employees whose chief duty was the processing of the various ACP applications.

Q. You were aware of the various programs within the scope of the ASC office in Pinal County, as well as in other counties, that a particular program would be assigned to a particular employee, as far as the paper work is concerned, although the final responsibility might belong to the office manager, and in turn the committee, is that correct?

A. I was aware the various clerical employees were assigned certain duties. I wasn't aware anyone was assigned a duty to do one specific thing.

I don't think they had enough staff for that.

Q. You discussed the various and sundry matters in [199] connection with the office with other employees of the office besides Mr. Short, did you not?

(Testimony of Doyle S. Kennedy.)

A. The other current employees there, yes, sir.

Q. Let me ask you this. Did you have these signatures examined for comparison with the signatures or writing of other persons, by an expert, on that file?

A. Are you referring to the Doyle H. Dunkin signature?

Q. I am.

A. Yes, sir. We sent that to our laboratory in Washington with samples of Mr. Short's writing.

Q. You have not had this expert here to testify on this particular matter. Do you plan to?

A. That is entirely up to the United States Attorney, Mr. Stanfield.

Q. In this connection, as far as the handwriting is concerned, you would have obtained samples of Mr. Short's handwriting, would you not?

A. Yes, sir.

Q. Did you obtain samples before or after he suffered the stroke?

A. My recollection is that we obtained current samples at the time we discussed it. Now, I am not sure about that, but I think that is correct.

Q. That would have been in 1957, at the earliest?

A. Yes, sir. [200]

Q. As far as the written statement of Mr. Short that I have just handed you a few moments ago, you have had occasion during the course of the investigation of this case, and others, to investigate each and every point outlined therein, have you not?

(Testimony of Doyle S. Kennedy.)

A. I think that each and every point outlined in this statement has been investigated, but I won't say that I investigated all of them myself.

Q. You know that they were investigated?

A. Yes, sir.

Q. And some in connection with this case, some in connection with cases that have already been tried, some in connection with cases that have not yet been tried, is that right? A. Yes, sir.

Q. From what you know personally, as far as your investigation is concerned, have any of the statements or comments, or other matters contained in this statement on the part of Mr. Short disagreed with your investigation?

Mr. Holohan: I object to this. It is getting into gross hearsay.

Mr. Stanfield: I will withdraw the question.

The Court: He has withdrawn it.

Q. (By Mr. Stanfield): With reference to Mr. Short's statement, and the contents thereof, have you found any of [201] the information therein contained to be untrue?

A. I have found some conflicts, but I won't say that it is untrue.

Q. Now, at the risk of asking a question I might have asked in part before; during the various conversations that you had with Mr. Short on this statement, and so forth, you have had occasion to observe and notice his physical condition, haven't you? A. Yes, sir.

Q. Isn't it a fact that during the course of all

(Testimony of Doyle S. Kennedy.)

this conversation that you had with him, that he has had difficulty with his memory?

A. He has told me that he has had difficulties with his memory. I can't testify as to whether it is a fact or not.

Q. Hasn't he repeatedly referred to names and said, "I know who I mean, but I simply can't tell you the name"?

A. I have noticed that he has had difficulty in, especially in my earlier contacts with him, in pronouncing certain words, and he has at times had, or said, "That isn't exactly what I mean, but that is the name I mean."

Q. He has shown you a willingness to tell you a name, but he cannot think of a name?

A. Yes.

Q. Is that what you are saying?

A. He has appeared to show a willingness to tell a name, [202] but unable to pronounce it exactly correctly, in my earlier contacts with him.

Q. I only wanted to know what you observed.

Now, with reference to the Form 578 for Mr. Neely's farm, for the year 1955, you previously testified that Mr. Short told you, or may have told you, I think he said, that this is kind of involved, but, anyway, that Mr. Short had told you that Mr. Neely might have plowed up some cotton. Wasn't it something like that? The one in which he showed an overplant?

A. I am afraid if you can state a little more specifically, I will try to answer the question.

(Testimony of Doyle S. Kennedy.)

Mr. Whitney: If the Court please, I let this go on for some little time, but outside of this statement that the Government agreed that I could admit in evidence, I object to any testimony here as far as the Defendant Neely is concerned, subsequent to the 28th day of December, 1956, relative to the indictment, on the grounds that it is not binding on Neely, and was made after the last date mentioned in Count XII, which charges a conspiracy as far as Neely is concerned.

The Court: All right, the record will show your objection.

Q. (By Mr. Stanfield): Mr. Kennedy, do you recall the first time you met Mr. Short? [203]

A. Yes, sir.

Q. When and where was that?

A. The first time I ever met Mr. Short was, as I recall, in Los Angeles, in the office of John Griffin, our General Counsel there, and that was in the spring, I believe, of 1956, and I merely was introduced to him. He was up in Los Angeles working with Mr. Griffin on some other matter.

Q. You mean in connection with Pinal County and the cotton allotments?

A. I don't know whether it was cotton allotment, or not. It was some official Government business.

Q. Have you any recollection of his physical condition at the time of your first meeting, as you observed him?

(Testimony of Doyle S. Kennedy.)

A. Vaguely only. I just met him, and that was all.

Q. You could compare his condition at that time with what it was the first time you once again met him in November of 1958, could you not?

A. In a very general way only, Mr. Stanfield.

Q. Would you make such a comparison.

A. When I came down to Pinal County in November, 1956, Mr. Short appeared to be physically, and at least mentally, somewhat less alert, and he told me he had just suffered a stroke just two months prior to my seeing him in Pinal County in November, 1956.

Q. During the taking of Mr. Short's statement, and the [204] conversations you had with him with reference to the ASC, upon your inquiry, or otherwise, he pointed out to you certain other irregularities in the Pinal County allotment situation, didn't he, aside from the one on trial here today?

A. Did you say statements, plural, or are you referring to this first written statement?

Q. All. Any and all.

A. During my contacts with him, particularly at the time you were present, Mr. Stanfield, when this written statement was taken, or, rather, when the tape recording from which this written statement subsequently was made, he did point out irregularities which had not yet come to our attention.

Q. And he did mention a situation at the Casa Grande Country Club, did he not? A. Yes.

(Testimony of Doyle S. Kennedy.)

Q. And he did mention the Casa Grande Union High School, did he not? A. Yes, he did.

Q. And he did mention the PZ Ranch, did he not? A. I am not sure on that.

Q. Have you ever heard of the PZ Ranch in this connection? A. PZ?

Q. Yes.

A. The name doesn't seem familiar to me.

Q. How about the name Fred Ash, does that ring a bell? [205] A. Yes, sir.

Q. Did he mention the Pima Indian Reservation in this connection? A. Yes, sir.

Q. Did he mention the name Frank Russell in this connection? A. Yes.

Q. Did you discuss these cases with the United States Attorney?

A. I have acquainted the United States Attorney, to the best of my ability, with everything that I learned from Mr. Short, as from other avenues.

Q. Mr. Kennedy, are you familiar with the gross cotton allotment given or provided to the County of Pinal during the years 1954, 1955, and 1956, in general terms?

A. Did you say gross?

Q. Yes, total allotment allotted to the county.

A. I did have the figures. I don't call them to mind now. I know they were quite high.

Q. What do you mean by "quite high"?

A. Well, in comparison with the rest of the state, I believe Pinal County is the leading, or next

(Testimony of Doyle S. Kennedy.)

to the leading county in the matter of total allotments.

Q. You are not suggesting that there is anything wrong? A. No. [206]

Q. Just that they had a high allotment?

A. That is right.

Q. You have had occasion to check the records to find out whether or not Pinal County as a whole was overplanted during those years, haven't you?

A. I have checked some records showing the total planting in the county, yes, sir.

Q. You know that Pinal County at no time during the years '54, '55, and '56 was planted beyond its legally allotted cotton acreage?

A. No, sir, I don't know that. I know some of the reports may have shown that, but the results of our investigation showed there was overplanting not only in the instant cases, but in other cases.

Q. Are you talking about individual farms, or the county as the entire unit?

A. Well, the individual farms make up the county total.

Q. Let me ask a hypothetical question.

A. Yes, sir.

Q. If Pinal County in 1954 were allotted 150,000 acres of cotton, and planted and harvested 140,000 acres of cotton, regardless of what the individual farmers did, isn't the county overplanted, or not?

A. I am not in a position to answer the question

(Testimony of Doyle S. Kennedy.)

at all, because I am not sure of the criterion you would use. [207]

To me, if any of the farms are overplanted, then it would appear that since they are a part of the county, the county would be overplanted to that degree.

Q. In this hypothetical case, is the county within compliance, or does the same answer apply to that?

A. I don't see how the county can be in compliance if the farmers, or any of them in them are not.

Q. Does that mean any farmer in the county——

Mr. Holohan: I object to this line of questioning. Wholly immaterial.

The Court: Yes, I agree.

Q. (By Mr. Stanfield): Once again, in connection with the ACP program of practices within the county of Pinal, I believe you stated earlier that you have checked on a very few of the files on ACP and Pinal County for the year 1954, is that correct?

A. I don't remember making that statement.

Q. Would you state how many of the files you did examine in that connection for that year?

A. Mr. Stanfield, Special Agent Johnson more or less handled the detail of the ACP investigation, so I can only answer in general terms with respect to most of it.

Q. Do you think you know enough about the investigation of the ACP in connection with this

(Testimony of Doyle S. Kennedy.)

case that I can reasonably expect you to answer questions on it? [208]

A. If they are on details, I am afraid I don't.

Q. One question: Have you ever heard of a yellow-backed pamphlet called The ACP Program for Pinal County, in the year 1954?

A. I think that was a pamphlet issued by the County Committee explaining in layman's language the purposes of the ACP program, and I did see one in the County Office during the course of the investigation.

Q. Now, you made the statement, I believe, yesterday, that your investigation showed that Pinal County was the only county using what is known as Release and Reapportionment in the year 1954, isn't that right?

A. No, sir, I don't believe I made that definite statement. I said I understood that Pinal County—I didn't say our investigation showed it, because we investigated not all the counties in Arizona. I understood Pinal County was the only one that had used that program in 1954, and then I understood the State Office had prohibited them from using it subsequently, in 1955 and 1956.

Q. Subsequently to 1954, and could not use it in 1955 and 1956?

A. That was my understanding, yes, sir.

Q. Now, is the implication from that that this particular device was illegal in 1954?

A. The implication to me was that it was being

(Testimony of Doyle S. Kennedy.)

[209] misused in Pinal County in the manner in which they used it.

Q. But it was a legal device?

A. I think it was in the regulations.

Q. Do you know if it is still in the regulations?

A. I don't know, no, sir.

Q. Do you think you understand Release and Reapportionment sufficiently well to explain it?

A. I think the regulations provided, and this is the kind of explanation I can give you, that during 1954 a farmer who had a cotton allotment, and through some reason not under his control, lack of water, or something like that, was unable to plant the crop, was permitted to release that acreage back to the county, and still receive credit historically, upon which his future allotments would be based for that particular year.

But my understanding is it should have been released back to the county.

Pinal County, on the other hand, permitted the person releasing the allotment to designate the farmer to whom it was to go, and usually there was some arrangement where the farmer who got it paid the fellow who released it something, usually cash.

Q. This is based upon what you have heard, rather than what you know?

A. Well, you asked me if that was my understanding, and it is, sir. [210]

Q. Isn't it a fact that the individual farmer

(Testimony of Doyle S. Kennedy.)

could not designate to whom his cotton would go in such a case?

A. My understanding was that it should be released back unencumbered to the reserve to be apportioned, or reapportioned again, rather than as was done in Pinal County, having the farmer say, "I want this to go to my friend over here, Joe Smith," and have it run through that way.

Q. Nevertheless, for the years 1954, '55 and '56, this process was perfectly legal, and was on the books?

A. I am referring only to 1954. In 1955 and '56, I am not competent to state one way or the other, because I don't know.

Q. You don't know whether the law was changed or not?

A. Or the regulations, no, sir, I don't.

Q. Once again handing you Government's Exhibit 1 in evidence, which is the Listing Sheets for 1954, the page I have turned to contains the farm and listing for Farm 595, doesn't it?

A. Yes, sir.

Q. It also states that the name of the operator is Julian Woodruff, and the name of the owner is Kemper Marley?

A. Yes, sir.

Q. I will take that back. Now, on farm 595, these two persons were listed in the Listing Sheet as the owner and [211] operator for 1954, that is correct?

A. That's what it shows on the Listing Sheet, yes, sir.

(Testimony of Doyle S. Kennedy.)

Q. Did you have occasion to discuss this matter of this farm with either of these people during the investigation? A. No, sir.

Q. You don't know whether Julian Woodruff or Kemper Marley got an allotment notice, or anything else, for the year 1954, do you?

A. No, sir.

Mr. Stanfield: That is all.

Mr. Whitney: I would like to ask a couple of questions.

Recross Examination

Q. (By Mr. Whitney): Mr. Kennedy, referring to the cotton allotment notices sent out for the year 1954 to Mr. Neely, of which you testified the first time there was one announced by an Act of Congress, it was increased, and then finally arrived by adding 81 acres to 400.8, you remember that?

A. This was 1954?

Q. 1954. A. Yes, sir, I remember that.

Q. How many acres did the record show Mr. Neely actually planted that year? [212]

A. I would have to see it, to see the Form 578, which shows the measured acreage, Mr. Whitney.

Q. Referring to Government's Exhibit 11-A for identification, Form 578, I think.

A. Yes, this is a 578 for Short Staple Cotton for 1954, which shows a total planting of 388.9 acres.

Q. Which was under the 400.8 acres, assuming that that first lease was correct?

(Testimony of Doyle S. Kennedy.)

A. Well, I can't testify as to the first lease.

Q. I understand, assuming that it was, then he would be within his planting? In other words, he had planted less than the allotment, plus the 81 acres?

A. Assuming the lease was valid.

Q. That is right.

A. And all the requirements had been met.

Q. That is right.

A. Then his planting there is less than is shown on the Listing Sheet.

Q. Thank you.

A. For the final listing of that year.

Q. Now, Mr. Kennedy, from your examination you know that cotton allotments were bartered and sold all over Pinal County?

A. No, sir.

Q. During 1954, '55, and '56? [213]

A. No, sir, I can't make that statement at all.

Q. You didn't know that at all?

A. No.

Q. Did you make any investigation to determine that?

A. Yes, sir.

Q. All right. You found that there was some sales of allotments?

A. Well, I found no one who would admit for us that an allotment had been sold or bought.

I did find, or we all found, particularly in 1955 and 1956, that it was permissible under the regulations to combine, reconstitute two farms into one, and that there had been some leases on that, and that the County Committee had approved the reconstitution.

(Testimony of Doyle S. Kennedy.)

Q. That was so also in Maricopa County and Pima, and probably Yuma, all Arizona cotton growing counties?

A. I couldn't answer that at all, because I don't know.

Mr. Whitney: That is all.

Redirect Examination

Q. (By Mr. Hays): Mr. Kennedy, I will hand you Defendant's Exhibit I for identification. Did Mr. Neely show you that when he supposedly gave you, you and Mr. Johnson, all the pertinent papers?

A. This is a copy of what is headed "Sublease", and this is the one I believe we discussed yesterday, or was presented yesterday purporting to show the sublease of the property back to W. R. Burns.

No, sir, he did not.

Q. Were there any signatures on that lease?

A. There are none.

Q. You stated that release and reapportionment procedure was used in 1954, is that correct?

A. In Pinal County, yes, sir.

Q. And in response to Mr. Whitney's question, you mentioned reconstitution? A. Yes, sir.

Q. That was used in what years?

A. That I think is permissible, or has been permissible in any year.

Q. Was it used in 1955 and 1956 in the Pinal County Office? A. Yes, sir.

Q. What is the reconstitution procedure?

(Testimony of Doyle S. Kennedy.)

A. My understanding of it is that where, if I may give you an example, if I own a farm, and I want to increase my farming operations, and I find someone who will lease his farm to me, and I in addition want to plant the cotton allotment that goes with both farms on one or the other [215] parcels of land, I can go to the County Committee after executing a valid lease with the person who is letting him have his property, and if they approve——

Q. Who is “they”?

A. The County Committee, it is within their discretion. They have certain criteria to go by, both farms, the combined farm then has to be operated by one farmer, one operator under a common rotation system, and my understanding is they should be fairly close together, adjacent, or within the neighborhood.

If the County Committee in its discretion says all right, you may consider that one farm, then I may use the allotment for both of these former parcels of land, and plant it wherever I will on this so-called reconstituted farm.

Q. With reference to a question asked you by Mr. Stanfield, was Mr. Short, in your second conversation with him regarding the Doyle Dunkin signature, faced with the results of the handwriting analysis you said had been made on this signature?

A. Yes, sir, he was.

Q. Did he then indicate whether or not he had

(Testimony of Doyle S. Kennedy.)

signed the name "Doyle Dunkin" on those documents?

A. Yes, sir.

Q. He did indicate it? [216]

A. Yes, sir, he said, "That is my signature. I don't know why I did it."

Q. I will hand you Government's Exhibits 11-A and 11-D for identification, and ask you to examine them.

Did you discuss those documents with Mr. Neely in your conversation with him?

A. This is with Mr. Neely?

Q. Neely, now.

A. Yes, sir. This 11-A is the 1954 Short Staple measurements, and 11-D is the 1956 acreage measurements.

Mr. Hays: We will offer Government's Exhibit 11-A and Government's Exhibit 11-D in evidence.

Mr. Whitney: We have no objection to this.

Mr. Stanfield: No objection.

The Court: They may be received.

The Clerk: Government's Exhibits 11-A and 11-D in evidence.

(Said Forms 578 were received in evidence and marked as Government's Exhibits 11-A and 11-D, respectively.)

Mr. Hays: That is all the questions.

Recross Examination

Q. (By Mr. Whitney): Mr. Kennedy, talking about the farm combination in Pinal County, [217]

(Testimony of Doyle S. Kennedy.)

weren't all these practices approved by the State Committee here in Phoenix?

A. For what years, sir?

Q. 1954.

A. The State Committee I believe issued instructions as to what should be done. Now whether or not they subsequently approved them, and I think they did, I don't know.

Q. They may have approved them, as far as you know, from your investigation?

A. I know neither way, sir.

Q. How about 1955?

A. The same would—the 1955, there was no——

Q. Pardon?

A. We are speaking of reconstitutions now?

Q. I mean about all these actions of the Pinal County Committee, they were approved by the State Committee in 1955?

A. I think the State Committee has over-all charge of all the county committees. To what extent they go to approving specific actions, I couldn't say.

Q. That would also go for 1956?

A. Yes, sir.

Mr. Whitney: That is all.

Mr. Stanfield: No further questions.

Mr. Hays: That is all, Mr. Kennedy.

(Witness excused.) [218]

Mr. Holohan: Mr. Johnson, please.

LLOYD N. JOHNSON

called as a witness for the Government, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Holohan): State your name, please.

A. Lloyd N. Johnson.

Q. By whom are you employed?

A. The United States Department of Agriculture, Compliance and Investigation Division.

Q. How long have you been so employed?

A. About 16 years.

Q. And where do you generally reside?

A. At San Mateo, California.

Q. Did you undertake an investigation in the matter at issue here? A. Yes, sir.

Q. During the course of your investigation, did you come in contact with the Defendant Neely?

A. I did, sir.

Q. Did you interview him from time to time?

A. Yes, sir. [219]

Q. Do you have any idea about how many occasions?

A. Well, I would say a half a dozen occasions during the period the latter part of January, until about the latter part of March.

Q. And where did these interviews generally take place?

A. They generally took place at the Pinal County ASC Office. However, some of them were at his home in Chandler.

(Testimony of Lloyd N. Johnson.)

Q. Do you recall approximately when the first interview was?

A. I think the first interview was on January 22, or thereabouts. On or about that date.

Q. And where did it take place?

A. The first time I saw Mr. Neely was at the Casa Grande—at the Pinal County ASC Office in a brief conversation there.

And on that same day, or the next day, I can't recall definitely, we interviewed Mr. Neely at his home in Chandler.

Q. On this second interview at the home in Chandler, who was present?

A. Special Agent Kennedy, and Mr. Neely, and myself.

Q. And during the course of that interview were any documents turned over to you by the Defendant Neely?

A. Yes, Mr. Neely from his personal records there at his home gave us his copy of the Burns lease, his producer's copy of the Notices of Cotton Allotments for 1954, 1955, 1956, [220] and two Marketing Cards, I think the 1954 Short Staple card, and the 1956 Short Staple Marketing Card.

Mr. Holohan: May this be marked as Government's Exhibit 16-A for identification, and this document as 16-B for identification.

The Clerk: Government's Exhibits 16-A and 16-B for identification.

(Testimony of Lloyd N. Johnson.)

(Said Marketing Cards were marked as Government's Exhibits 16-A and 16-B for identification.)

Q. (By Mr. Holohan): You have made reference to the Burns lease. I will hand you what has been marked Government's Exhibit 15 in evidence, and ask you whether that is the document that was turned over to you?

A. Yes, this is the lease which Mr. Neely made available on that occasion.

Q. I will hand you what has been marked Defendant's Exhibit I for identification. Was that ever shown to you?

A. I have never seen this.

Q. I will hand you a series of documents here beginning with 17-A for identification.

A. This is a notice of Farm Acreage Allotment for 1954, Short Staple Cotton, dated December 11, 1953.

Q. From whom did you receive that?

A. Mr. Neely.

Q. I hand you Government's Exhibit 17-B for identification. [221]

A. A similar notice dated February 16, 1954, for Short Staple Allotment.

Q. From whom did you receive that?

A. From Mr. Neely.

Q. On this same occasion? A. Yes.

Q. Government's Exhibit 18 for identification.

A. Another revised Notice of Allotment. No, pardon me, this is 1955. This is a 1955 acreage

(Testimony of Lloyd N. Johnson.)

allotment for Upland Cotton dated November 12, 1954, which I also received from Mr. Neely on that occasion.

Q. And I will hand you Government's Exhibit 18-B for identification.

A. This is a Notice of 1955 Allotment on Extra Long Staple Cotton, dated March 3, 1955, which also was handed to me by Mr. Neely on the date of our visit at his home.

Q. And lastly, Government's Exhibit 19 for identification.

A. A 1956 Notice of Allotment of Upland Cotton, dated December 1, 1955, which Mr. Neely gave me along with these other allotments, at his home.

Q. All right. The revised notice that you mentioned, is that Exhibit 17-C?

A. Yes, that is a Revised Notice of 1954 Upland Cotton Allotment, dated March 19, 1954.

Mr. Holohan: At this time the Government [222] offers Government's Exhibits 17-A for identification, 17-B for identification, 18-A for identification, 18-B for identification, and 19 for identification, in evidence.

The Court: We will have our morning recess at this time.

(Recess.)

The Court: You may continue.

Mr. Holohan: It is my understanding there is no objection to the documents we asked to be offered in evidence.

Mr. Whitney: No objection.

(Testimony of Lloyd N. Johnson.)

The Court: They may be received.

The Clerk: Government's Exhibits 17-A, 17-B, 18-A, 18-B, and 19 in evidence.

(Said Notices of Allotment were received in evidence as Government's Exhibits 17-A, 17-B, 18-A, 18-B and 19.)

Mr. Holohan: I don't recall whether we offered 20 and 21 in evidence or not yesterday. They aren't marked, so we will offer them in evidence at this time.

Mr. Whitney: What are they?

Mr. Holohan: They are the deposit slips and ledger sheet card.

Mr. Whitney: I see no objection.

Mr. Stanfield: No objection.

The Court: They may be received.

The Clerk: Government's Exhibits 20 and 21 in evidence. [223]

(Said Ledger Sheet was marked as Government's Exhibit 20 in evidence, and said Deposit Slip was marked as Government's Exhibit 21 in evidence.)

Mr. Holohan: May this exhibit be marked as Government's Exhibit 16-C for identification. It is also Defendant's Exhibit E, is it not?

Mr. Whitney: Yes.

The Clerk: Defendant's Exhibit E and Government's Exhibit 16-C for identification.

(Said Marketing Card was marked as Defendant's Exhibit E and Government's Exhibit 16-C for identification.)

(Testimony of Lloyd N. Johnson.)

Q. (By Mr. Hays): All right, in the course of this interview at the house, that was the first interview that you had at the house? A. Yes.

Q. Did he give you any marketing cards, he being the Defendant Neely?

A. Yes, Mr. Neely gave me his 1954 Short Staple, and his 1956 Short Staple Marketing Card.

Q. I will hand you what has been marked 16-A for identification, and ask you whether that is one of the cards?

A. Yes, this is the 1954 Short Staple card.

Q. All right. And I will hand you what has been marked 16-B for identification, and ask you what that is. [224]

A. This is his 1955 Short Staple Marketing Card.

Q. You didn't get that from him?

A. No, I didn't. I picked this up at the Chandler Gin Company.

Q. Which handles his account? A. Yes.

Q. I will hand you what has been marked 16-C for identification, and Defendant's Exhibit E.

A. That is the 1956 Short Staple Marketing Card which Mr. Neely gave me on that occasion.

Q. All right.

Mr. Holohan: At this time, the Government offers in evidence Government's Exhibit 16-A, 16-B, and 16-C, all for identification. And at the same time we will also offer Government's Exhibits 4, 5, and 6, Marketing Card Registers for the respective years.

(Testimony of Lloyd N. Johnson.)

Mr. Whitney: Which one of those was identified as being picked up at the Chandler Gin?

Mr. Holohan: I will have to ask the witness.

Q. (By Mr. Holohan): Which one of these did you pick up at the Chandler Gin Company?

A. This one, 1955.

Mr. Whitney: What is the number of it?

Mr. Holohan: 16-B.

Mr. Whitney: No objection. [225]

Mr. Stanfield: No objection.

The Clerk: Government's Exhibits 16-A, 16-B, and 16-C in evidence.

(Said Marketing Cards were received in evidence and marked as Government's Exhibits 16-A, 16-B, and 16-C.)

Mr. Whitney: As for 4, 5, and 6, I will let Mr. Stanfield look at these. I don't know anything about them. I might ask Mr. Holohan. I understood somebody testified they were kept in the ordinary course of business down there at the office?

Mr. Holohan: Right.

Mr. Whitney: As far as I am concerned, there is no objection.

Mr. Stanfield: No objection.

The Court: They may be received.

The Clerk: Government's Exhibits 4, 5, and 6 in evidence.

(Said Marketing Card Registers were received in evidence and marked as Government's Exhibits 4, 5, and 6.)

(Testimony of Lloyd N. Johnson.)

Mr. Holohan: May this be marked for identification.

The Clerk: Government's Exhibit 24 for identification.

(Said Statement of Rex L. Neely was marked as Government's Exhibit 24 for identification.)

Q. (By Mr. Holohan): Now, on this first interview at the [226] house, when these various documents were turned over to you, approximately what length of time was consumed in that interview?

A. Oh, I think we were at Mr. Neely's home for about an hour and a half, possibly two hours, or thereabouts.

Q. All right. Was a statement taken from the Defendant at that time?

A. Yes, we incorporated the gist of our conversation that evening in a written statement.

Q. Who wrote the statement?

A. I wrote the statement in my handwriting.

Q. I will hand you what has been marked Government's Exhibit 25 for identification, and ask you to examine that. Is that the statement which you wrote up?

A. Yes, sir.

Q. When was it actually written up there? Was it on the same date of the interview?

A. It was in the evening on January 22nd, the date of the statement, as I recall.

Q. Does the statement bear a signature?

A. Yes, sir. It is signed "Rex L. Neely," witnessed by Doyle S. Kennedy and Lloyd N. Johnson.

(Testimony of Lloyd N. Johnson.)

Q. The Rex L. Neely, was the Defendant here in this case? A. Yes, sir. [227]

Q. Did he sign that in your presence?

A. Yes, sir.

Q. Did he willingly give you the statement which he incorporated? A. Yes, sir.

Q. Did you give him the statement to read?

A. Yes, he read over the statement that evening.

Q. Were there any corrections or anything that he made in the statement?

A. I don't recall that there were. There may have been. I see one part deleted, and part of a sentence deleted here.

Q. And is it initialed, do you recall, or does the statement——

A. Yes, it bears Mr. Neely's initial.

Q. And he initialed that in your presence on this occasion? A. Yes, sir.

Q. And did the interview concern the events which are part of this case here?

A. Yes. Some of them that we knew of at that time, yes.

Q. Were there other interviews after this date in January when you interviewed him and took the statement? A. Yes.

Mr. Holohan: At this time the Government offers in evidence Government's Exhibit 25 [228] for identification as Government's Exhibit 25.

Mr. Whitney: May I ask a question on voir dire?

The Court: You may.

(Testimony of Lloyd N. Johnson.)

Q. (By Mr. Whitney): At the time that you made this investigation and took this statement, was that done on a tape recorder?

A. This was not tape recorded, no, sir.

Q. Several other statements were taken that were taped? A. That weren't taped?

Q. That were taped? A. Yes, sir.

Q. This is the only statement that was taken that was not taken on a tape recorder?

A. That is right, sir.

Q. And this statement is in your handwriting?

A. Yes, sir.

Q. You wrote it up and Mr. Neely signed it?

A. Yes, sir.

Q. After reading it. Now, you gave him the regular warning that this might be used as evidence against him?

A. I think that is right in the statement, Mr. Whitney, in the first paragraph.

Q. And was that done on the tape recording also?

A. I don't recall that those words were used in the tape recording. [229]

Mr. Whitney: No objection.

Mr. Stanfield: As to the Defendant Short, objection is made on the basis of relevancy.

The Court: It may be received.

The Clerk: Government's Exhibit 25 in evidence.

(Said Statement of Rex L. Neely was received in evidence and marked as Government's Exhibit 25.)

(Testimony of Lloyd N. Johnson.)

Q. (By Mr. Holohan): Now, in your various interviews with the Defendant Neely, did you discuss with him the securing of short staple allotment in 1954? A. I did.

Q. All right. In these various interviews, was Mr. Kennedy present at all of them?

A. Mr. Kennedy was not present at all of the interviews I had with Mr. Neely.

Q. Where were most of the interviews taken?

A. They were mostly taken at the Pinal County ASC Office, at which time Mr. Kennedy was present.

Q. And there were some taken at his home?

A. Yes.

Q. Was there more than one taken in the home?

A. Yes. I saw Mr. Neely in the latter part of March at his home when Mr. Kennedy was not with me.

Q. All right. Now, what did Mr. Neely say as to how he came to get the 400 acres of cotton allotment in 1954? [230]

Mr. Whitney: If the Court please, I object. If he remembers anything outside the statement, if he is going to do anything outside of that statement, then I insist they get the tape recorder here, and let's hear it all.

The Court: Have you heard it?

Mr. Whitney: Yes. I have spent five hours listening to it.

The Court: You tell me what you want repeated, so we can save time.

(Testimony of Lloyd N. Johnson.)

Mr. Whitney: I can't cross examine without the tape recording. I have heard the tape recording, and I know it takes five hours to play it.

The Court: If you have heard it, you tell the Court what you want. Go ahead.

Q. (By Mr. Holohan): Thank you. Proceed, then.

A. Is the question concerning——

Q. 1954.

A. 1954. Mr. Neely told me, substantially, that in the fall of 1953, I believe, he was desirous of obtaining some extra cotton allotment, and in that connection he asked a Mr. Mike Watson as to whether or not Mr. Watson knew where he could get some cotton acreage, and Mr. Watson referred him to Mr. Short at the Pinal County ASC Office, stating that he thought that Mr. Short might know of some.

That he thereafter contacted Mr. Short regarding [231] this, and that Mr. Short procured for him 81 acres of allotment pursuant to the arrangements under this so-called Burns lease.

Q. That is the document you have previously identified here? A. Yes.

Q. All right.

A. That Mr. Neely said that at that time he gave Mr. Short, issued Mr. Short his personal check in the amount of \$1620, \$20 per acre, in payment for this acreage.

Q. Did Mr. Neely ever state that he knew this W. R. Burns?

(Testimony of Lloyd N. Johnson.)

A. Mr. Neely stated that he didn't know this W. R. Burns.

Q. How was the transaction with the lease handled, so far as Mr. Neely's version of it?

A. Mr. Neely said that the transaction took place at the ASC Office. That Mr. Short produced this lease, which already had the signature W. R. Burns affixed thereto, and that in Mr. Short's presence, he, Mr. Neely, signed the lease, and it was witnessed at that time by Mr. Short.

Q. Was there a discussion concerning the 1955 crop of short staple cotton?

A. Yes. Mr. Neely said again, substantially, that he wanted to get some extra allotment in 1955, and that he asked Mr. Short if the allotment on the Burns farm would be available [232] again for that year, for the 1955 crop year.

Q. All right.

A. That Mr. Short told him he would find out, that he thought it would be, and that some few days subsequently thereto, Mr. Short informed him that he could have, I think seventy and one-half acres.

Q. Did Mr. Neely state that these conversations had taken place after he had received his allotment notice for the coming season?

A. I think he said that they took place about the time the 1955 allotment notices were issued. Whether it was afterward, I don't know. I thought it was.

Q. Did he describe a lease transaction in 1955?

(Testimony of Lloyd N. Johnson.)

A. No. He said he didn't get a lease in connection with the 1955 arrangement. He said that the matter of a lease was not mentioned, but that he expected there would be one forthcoming later on.

Q. Was he given a revised notice of allotment in 1955? A. No, sir.

Q. The only allotment notice that he had was the one that has been produced here which he gave you? A. That is right.

Q. What was the rate of compensation in 1955?

A. I believe it was the same as 1954, \$20 per acre. The check which he issued in 1955, to the best of my recollection, [233] was for \$1,410.00, which would be seventy and one-half acres.

Q. Besides short staple cotton, did the defendant state that he planted any other, the long staple type of cotton that year? A. In 1955?

Q. In 1955. A. Yes, he did.

Q. Was the defendant able to produce his 1955 Marketing Card?

A. No, he was not able to find it on the evening of our visit at his home, nor subsequently thereto.

Q. The Marketing Card Register does show he was issued one, however? A. Yes.

Q. Now, with regard to the year 1955, was there any discussion with the Defendant Neely as to the amount of acreage that he planted?

A. Yes, there was. Mr. Neely in going over his Form 578 for 1955, as I recall, questioned the measured figure there.

(Testimony of Lloyd N. Johnson.)

Q. What did he have to say about the signing of the 578, and the figures there?

A. He said that he went to the Pinal County Office and talked to Mr. Short. Upon that occasion, Mr. Short brought out his 578, and asked him if he had destroyed any cotton. He said that he had not at that time. [234]

He said he then signed the form, received his Marketing Card from Mr. Short, and went back out to his farm on that same day, and personally destroyed about 15 acres of cotton.

Q. That is one-five, fifteen? A. Yes.

Mr. Whitney: How many?

The Witness: About fifteen.

Q. (By Mr. Holohan): Now, at the time that the 578 was signed up, did the Defendant state what figures were on there?

A. He said to the best of his recollection that when he signed the 578, that he didn't recall seeing the figures, the measured figures in the various fields, and that definitely he did not see any figures representing destroyed acres.

Mr. Whitney: This is all 1955 we are talking about?

The Witness: This is all 1955 Short Staple, Mr. Whitney.

Q. (By Mr. Holohan): Was there any discussion by you with the Defendant as to the 1955 Long Staple? A. Yes, sir.

Q. All right, what was that?

A. He said that on that same occasion he re-

(Testimony of Lloyd N. Johnson.)

ceived his Long Staple Marketing Card from Mr. Short after signing his form 578 for Long Staple.

Q. All right. [235]

A. He said that he was overplanted in long staple, that he didn't destroy any long staple in 1955.

Q. Did he state whether he recalls whether the destroyed figures were already on the 578?

A. That would be the same as the short staple. He said that the destroyed, the figures representing destroyed cotton were not on the form when he signed it.

Q. He said they definitely were not on it?

A. Yes.

Q. These 578's that we have been talking about are this series, in 11-A through D, are they not?

A. Yes.

Q. On 11-C and 11-B, the destroyed acreage is placed in red, is it not?

A. That is right.

Q. At the time Mr. Neely claims that he did not see, or that those figures were not on, or he does not recall them being on?

A. To the best of my recollection, Mr. Neely at first said that he did not recall having seen the destroyed figures on the 578, and I think later he was quite definite in saying they were not on there.

Q. Now, was there any discussion about the short staple allotment in 1956? [236]

A. Yes. Again Mr. Neely recounted that he sought some extra short staple allotment from Mr.

(Testimony of Lloyd N. Johnson.)

Short for the 1956 crop year, that he went to the ASC Office about this, and inquired of Mr. Neely whether the Burns allotment would be available again for 1956, and that Mr. Neely subsequently made available 60 acres, or that Mr. Short subsequently made available 60 acres for 1956, that Mr. Neely issued his check to Mr. Short on that occasion under those arrangements for \$1750.

Q. These checks you have spoken about, were they ever identified by the Defendant Neely?

A. Yes, we discussed those checks with Mr. Neely.

Q. I will hand you what has been marked 14-A, 14-B, and 14-C, all in evidence.

A. Yes, these are the checks which we discussed with Mr. Neely.

Q. Covering the three years in question?

A. Yes.

Q. These, of course, were made available, or caused to be made available to you by the Defendant Neely? A. That is right.

Q. Now, in 1956, what was the rate that was agreed upon between the Defendants Short and Neely, according to the Defendant Neely?

A. Mr. Neely said that Mr. Short set the rate per acre, [237] and to the best of my recollection, it was \$25 for 1956.

Q. On the amount shown on the check for that year, does that jibe with the figure of \$25 per acre, and the number of acres allotted?

A. No, the amount of the check, on the basis

(Testimony of Lloyd N. Johnson.)

of \$25 an acre for the 60 acres, would be \$1500, I believe. Now, in that connection, Mr. Neely said he paid more for the 1956 acreage than he had previously, because he thought it was worth more, and in addition to that he said that he made the check for an extra \$250, because he understood Mrs. Short was going to the hospital, and he wanted to assist Mr. Short with these hospital expenses.

Q. Now, was there any discussion with the Defendant Neely as to his plant in 1956, the plant of short staple cotton in Pinal County?

A. Yes. We discussed his planted acreage, that is, his measured acreage as shown on the Form 578.

Q. I believe that is 11-D for identification. Or in evidence, excuse me.

A. Yes, 11-D in evidence. 1956 Report of Acreage, showing measured acreage of 477.7 acres.

Q. Was that discussed with the Defendant Neely? A. Yes.

Q. Did he make any comment as to the amount shown for 1956? [238]

A. Mr. Neely said that he wouldn't exactly—well, now, wait a minute. Mr. Neely said yes, that he would confirm this acreage as his 1956 acreage.

Q. In 1955 he thought they had over-measured him, but in 1956 he agreed that that was about right?

A. I think he would say substantially correct, yes.

Q. Now, was there any discussion about his destruction in 1956?

(Testimony of Lloyd N. Johnson.)

A. Yes. It was observed from the 578 that he hadn't destroyed any of his 1956 short staple, and in going over this with him, he acknowledged that he had not. And he gave various reasons for not having done so.

Q. What were his reasons?

A. Well, if I recall correctly, he said, first of all, that he had gone to the Pinal County ASC Office, and had gotten his marketing card, apparently assuming that was all he needed.

Q. All right.

A. He also said that he was over-extended on water in 1956, not having enough to go around, and that he had some burned spots in some of his fields, that if he destroyed any cotton, it would result in a short crop.

Q. All right.

A. He also said that he hadn't received an over-plant notice, and didn't know exactly how much to destroy. I think [239] as I recall, he further said that he had heard conversations in the county among farmers, and others, of general laxity in the ASC Office, and that farmers were not destroying cotton, and that he thought he might get by without destroying any for that year.

Q. Did he ever say that he got a lease for the Burns place in 1956?

A. No. There again he said that a lease was not mentioned in his conversation with Mr. Short, that, however, he expected that one might follow.

(Testimony of Lloyd N. Johnson.)

Q. Now, the Defendant also has operations in Maricopa County, doesn't he?

A. That is right.

Q. In the year 1956, he entered into a combination in Maricopa County, didn't he?

Mr. Whitney: I object to this. No charge in the indictment on that, that I know of.

The Court: What does that have to do in this case?

Mr. Holohan: Knowledge, your Honor.

The Court: Knowledge of what?

Mr. Holohan: Of the necessity for a combination to revise the allotment, and that your Marketing Card should show an additional allotment. The Marketing Cards for Pinal show the original allotment. He got none for the Burns farm in 1955 and 1956. [240]

The Court: All right, go ahead.

Mr. Stanfield: We object on the ground that there is no showing that the rules of Pinal County apply.

The Court: The regulations are the same. Go ahead.

The Witness: That was 1955?

Q. (By Mr. Holohan): In 1955, he operated a combination in Maricopa?

A. I understand that he did, yes, sir.

Q. Did he admit that he did?

A. I don't recall talking to Mr. Neely specifically concerning a specific combination. The Maricopa County records show such a combination.

(Testimony of Lloyd N. Johnson.)

Q. Now, was there any discussion with the Defendant as to ACP? A. Yes.

Q. What do we mean by ACP?

A. Agricultural Conservation Program.

Mr. Holohan: May this be marked in the 12 series. It would probably be "G" as an exhibit for identification.

The Clerk: Government's Exhibit 12-G for identification.

(Said document was marked as Government's Exhibit 12-G for identification.)

Q. (By Mr. Holohan): Now, at the time that you had the [241] conversation with the Defendant Neely regarding the ACP, did you have the benefit of the various documents to assist you in the discussion with him? A. Yes, sir.

Q. And did you go over the documents with him? A. Yes, sir.

Q. I will show you these things that I have available here as 12-A, B, D, E, and F, all in evidence.

Were those the documents that you went over with the Defendant?

A. Yes. We discussed them with Mr. Neely.

Q. Do you recall off-hand when that discussion took place?

A. This was in March. It possibly was the latter part of March.

Q. And where did it take place?

A. At the Pinal County ASC Office.

Q. And who was present with you there?

(Testimony of Lloyd N. Johnson.)

A. Special Agent Kennedy was there.

Q. I have located 12-C here. Was that also one of the documents that you went over?

A. That is one of the documents, yes, sir.

Q. All right. Did the Defendant say he had received payment for the practice represented by those papers in 1954?

A. Yes, he said that he had received payment for this particular practice.

Q. All right. Starting with 12-A in evidence, that document is which?

A. 12-A is the application, that is, Form 201. It is a request that the Federal Government share costs of needed conservation practices.

Q. Now, two practices are placed on that document, are they not?

A. Yes. This is under the 1954 Agricultural Conservation Program, and there is a request, that is, these practices are named Land Leveling, and Ditch Lining.

Q. All right. What did the Defendant have to say about the business of the two practices there?

A. To the best of my recollection, Mr. Neely said that in this year he had requested a land leveling practice.

Q. On the approximate date set forth in the document?

A. Yes.

Mr. Whitney: In what year? 1954?

A. (By the Witness): It is 1954. And that he had gone ahead pursuant to this request, and tentative approval, and had done some land leveling.

(Testimony of Lloyd N. Johnson.)

That, however, later on during the summer, when the soil conservation came out to his farm to check on the performance, they wouldn't, they declined to certify performance, because he wasn't right up to specifications. [243] That they—that he—no, that they said that he would have to bring his leveling up to grade.

I think he said that this was at the time when he needed to get a crop in, and that the delay in doing further work and waiting for additional inspection, and getting approval from Soil Conservation would delay him to a point where it would interfere with the planting of the crop on that particular field, and that he therefore went ahead and farmed this tract.

Q. He did not pursue that part of the practice any further? A. No.

Q. Now, did he fix any date as to when this inspection, the land leveling inspection, on the land leveling, had taken place?

A. Mr. Neely seemed not to be able to recall definitely the dates involved, but he finally said that it must have been after the land leveling was declined approval, of the land leveling, that the change was made.

Q. And did he place any approximate time as to when the land leveling had been denied?

A. I don't remember that he said any particular date. I think it was in the summer, July or August.

Q. He placed the time as of July or August of 1954?

(Testimony of Lloyd N. Johnson.)

A. To the best of my recollection. [244]

Q. All right. Now, was he asked about the entry showing that the change from land leveling, as shown on 12-A, that the change from land leveling to ditch lining had taken place on May 27th?

A. Yes, we discussed the date of that, the purported date of that change with him as being May 27.

Q. What did he save to say about that?

A. At first, as I say, he didn't know. He thought maybe that could be, but he later, when we went over and got into the circumstances, said that the change must have been made later on in the year, after the land leveling was denied.

Q. Now, the specific ditch in question for which he was paid, did you discuss that with him?

A. Yes.

Q. What did he have to say about that specific ditch?

A. Well, Mr. Neely said that he had a ditch installed in the spring of 1954, that it would have had to have been in early in the spring, at least in February or March, because he had used it to irrigate his spring crop that year.

Q. And the date of the application as shown by 12-A is in May? A. May 24, 1954.

Q. Now, counsel earlier in the trial asked about another practice. Did you discuss that with the Defendant?

A. Yes, we did. That was an earlier practice [245] completed in the fall, in December and early

(Testimony of Lloyd N. Johnson.)

January of—December, 1953, and early January, 1954.

Q. And what did it concern?

A. It covered a mile and a half of ditch lining on it.

Q. All right. Now, would you take this piece of chalk, and I will take those, and I will hand you what has been marked 12-G, and before you go to the board with regard to this 12-G for identification, did you make up that document?

A. Yes, I did. It is initialed and dated by me.

Q. When was it made up?

A. I have it dated March 22, 1957.

Q. And who was present while you were making it?

A. A Mr. Neely, a Mr. Kennedy, I believe was there on that occasion.

Q. Did you make use of the document in question during your interview?

A. Yes, sir.

Q. All right. Now, if I may ask you, you have the piece of chalk there. Would you draw on the blackboard there the set-up of the ditch lining practices for the two years.

A. In going over Mr. Neely's ditch lining, this is the information which he supplied, to the best of his recollection. (Witness draws on blackboard.)

I am sure these section lines were straighter than what I have done. [246]

The earlier practice was——

Mr. Whitney: The what practice?

The Witness: The earlier practice, the one be-

(Testimony of Lloyd N. Johnson.)

fore this one in the spring of 1954, was DF on the east section line, and BC between the southwest and southeast quarters.

Q. Would you put regular cross marks on those.

A. (Witness draws on blackboard.)

Q. Those were covered by applications prior to the year 1954? A. Yes, sir.

Q. However, when was the Defendant paid for those practices?

A. He was paid on April in April, 1954.

Q. When was the ditch "A" to "B", according to the Defendant's version, put in?

A. This was the one that was put in in the spring of 1954, February or March.

Q. Would you put some cross marks on that one? A. (Witness draws on blackboard.)

Q. That was in February or March of 1954, and that, according to the Defendant Neely's version, he had actually thought he was applying for ditch lining sometime after his land leveling had been turned down? A. That is right.

Q. Did he acknowledge that he had gotten payment for the [247] A to B ditch lining there in 1954?

A. This 1954 practice. Yes, I think he did say he had received payment for that.

The Court: We will suspend at this point until two o'clock.

Keep in mind the Court's admonition.

(The noon recess was taken.) [248]

No. 16418

United States
Court of Appeals
for the Ninth Circuit

REX L. NEELY, Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 241 to 510, Inc.)

Appeal from the United States District Court
for the District of Arizona

FILED

JUL 17 1959

PAUL P. O'BRIEN, CLERK



No. 16418

United States
Court of Appeals
for the Ninth Circuit

REX L. NEELY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 241 to 510, Inc.)

Appeal from the United States District Court
for the District of Arizona

Afternoon Session

Thursday, September 11, 1958

Two O'Clock P.M.

Court resumed pursuant to recess.

Present: The same as before.

The Court: You may continue.

LLOYD N. JOHNSON

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Holohan): Now, I will hand you what has been marked 24 for identification. Would you examine that document, please.

Are you familiar with it?

A. Yes, sir.

Q. By whom was it prepared?

A. I prepared this as a statement for Mr. Neely.

Q. All right. Without going into the actual contents of the document, what is it?

A. It is a summarization of the substance of my conversations with Mr. Neely concerning the matters about which we [249] spoke this morning.

Q. All right. Now, was that ever given or shown to the Defendant?

A. Yes. Mr. Neely read this statement, and we discussed the contents of it.

Q. And when did he read it?

A. It was on or about March 24, the date of the statement. I wouldn't say that was the exact date, but it was very close.

(Testimony of Lloyd N. Johnson.)

Q. Did he take any action with regard to the physical statement itself?

A. Yes, we went over it, and after he read it, he had certain changes, or I should say deletions to make in portions of the statement, which he did.

Q. And did he make such deletions on the statement, Government's Exhibit 24 for identification?

A. At Mr. Neely's request, I ruled out certain parts of sentences, or sentences, which changes he initialed at the time we made the deletions.

Q. Now, did he indicate that the contents of the statement as deleted was correct?

A. Yes. As far as it was, after these changes which he suggested, why, he indicated that that was substantially correct.

Q. Now, did he sign the document?

A. No, he didn't sign the document itself. [250]

Q. What happened concerning that?

A. Well, after reading it over and making the certain changes or deletions, he said he would like to think it over for a time before signing it.

Q. All right, what was the understanding then about the period in between?

A. The understanding then was that we should meet a day or two later. I think it was two days later, at some time we would again discuss the matter of signing the statement.

Q. And thereafter did you meet with the Defendant?

A. Yes, I think it was two days later I met Mr.

(Testimony of Lloyd N. Johnson.)

Neely by appointment, or prearrangement, and at that time he asked me if I had a copy of the statement, which I didn't have, and at that time he said that he would like to show it to an attorney before he affixed his signature to it.

Q. All right. Was anything further done?

A. I told Mr. Neely I would have to consult Mr. Hays regarding this, which I did, and Mr. Hays said to just let it go.

Mr. Holohan: At this time the Government offers in evidence Government's Exhibit 24 for identification as Government's Exhibit 24.

Mr. Whitney: May I ask a question on voir dire, if the Court please?

The Court: You may. [251]

Q. (By Mr. Whitney): Mr. Johnson, this statement was prepared by you? A. Yes, sir.

Q. And it is supposed to be some kind of a condensation of a longwinded tape recording lasting about five hours?

A. That plus some other interviews I had with Mr. Neely, yes.

Q. And when was that tape recording taken?

A. Well, the tape recordings were taken on I think two occasions, in March, possibly, in February and March.

Q. Now, this particular document I notice is dated March 24, 1957. A. Yes.

Q. The tape recording was taken sometime before that? A. That is correct.

(Testimony of Lloyd N. Johnson.)

Q. And this was written up subsequent to March 24, 1957? A. Subsequent to March 24th?

Q. Yes. In other words, as I remember, these tape recordings were taken on the 22nd and 24th of March.

A. I don't remember any specific dates, but I don't remember a March 24th date for a tape recording.

Q. Anyway, when you made this up, it was probably dated back to the 24th of March?

A. No, that date, Mr. Whitney, may have been the date that I actually wrote the statement, but maybe not the date [252] that I talked to Mr. Neely about them. There may have been one day in there, a one-day lag. I don't know. I don't know about those specific dates.

Q. And he inquired of you about getting a copy to see a lawyer? A. Yes, sir.

Q. To show to a lawyer? A. Yes, sir.

Q. And you didn't give him a copy?

A. I didn't, no, sir.

Mr. Whitney: I don't think there is any objection to this, if you want to use it.

Mr. Stanfield: On behalf of the Defendant Short, the same objection is interposed as heretofore made on the other Statement.

The Court: All right. The record will show the objection. It may be received.

The Clerk: Government's Exhibit 24 in evidence.

(Testimony of Lloyd N. Johnson.)

(Said Statement of Rex L. Neely was received in evidence and marked as Government's Exhibit 24.)

Q. (By Mr. Holohan): On this matter of tape recordings and statements that you have had reference to, this wasn't all one session that these interviews that we have had reference to were taken? A. No. [253]

Q. There were a number of interviews over a period of time? A. That is right.

Q. Your first meeting was in January of 1957?

A. That is right, the latter part of January of 1957.

Q. That was the meeting of the office, and then there was the meeting at the home where this first preliminary statement was taken?

A. Correct.

Q. And from time to time as you delved into records, and interviewed others, you would **contact** the Defendant again?

A. That is substantially correct, yes, sir.

Q. There were times that he asked that he be given time for him to check records of his own?

A. Well, I think so, on an occasion or two, yes.

Q. Now, with regard again to the ACP payment on the A to B ditch up there in 1954, the one that was finished in March, and the application covers in May of that year; was the Defendant confronted with the fact that the ditch had already been completed at the time the application was made?

(Testimony of Lloyd N. Johnson.)

A. Yes. And I asked Mr. Neely at the time if he didn't know that a request for assistance had to be made prior to starting an ACP——

Mr. Whitney: Was that in this statement, Mr. Johnson? [254]

The Witness: I think so.

Mr. Whitney: The statement is there.

The Witness: I don't know whether it is in that detail.

Q. (By Mr. Holohan): Will you go on? I haven't heard the objection.

A. And Mr. Neely said that he didn't know at that time that it was necessary to request before starting the practice.

Mr. Holohan: You may cross examine this witness.

Cross Examination

Q. (By Mr. Whitney): Mr. Johnson, how long have you been with the Department of Agriculture? Quite a length of time, haven't you?

A. About 16 years, yes, sir.

Q. What has been your duties during that period of time?

A. I have been engaged in investigating various irregularities of the Department's programs, and doing review work in our Headquarters Office.

Q. Has it had mostly to do with cotton or other crops?

A. No, sir, this is the first cotton matter I have worked in.

(Testimony of Lloyd N. Johnson.)

Q. Now, during all of your conversation with Mr. Neely, he fully cooperated with you? [255]

A. Yes, he was cooperative.

Q. And he had no lawyer?

A. He didn't have an attorney, as far as I knew.

Q. And the only time that he asked for a lawyer is when you tried to get this last statement, Government's Exhibit 24?

A. That is the first time he said that he would like to see—at least he mentioned to me he would like to see a lawyer.

Q. Now, had he ever indicated to you in this statement, or in the tape recording, or at any other time that he ever thought there was no such a thing as the Burns farm?

A. No. I asked Mr. Neely that question on a number of occasions, and he said that——

Q. That he honestly thought there was a Burns farm? A. Well, he said that he——

Q. And that he honestly thought that he got these additional allotments for 1954, 1955, and 1956, open and above board?

A. Mr. Neely said he didn't know that there wasn't a Burns farm.

Q. He never indicated to you that he knew anything about this until sometime in the latter part of December, 1956?

A. That's when he said that he——

Q. Learned for the first time?

A. He suspected for the first time that there was [256] something wrong.

(Testimony of Lloyd N. Johnson.)

Q. That's right. Did he tell you that he fully relied on that office? A. Yes, sir.

Q. And that he fully relied upon the statements that were made by Mr. Short? A. Yes, sir.

Q. Now, in connection with the 1954 matter which Mr. Kennedy has straightened out in pretty good shape, did he tell you that he first gave Short a check, and had payment stopped on it until such time as he got a written lease? A. No, sir.

Q. He didn't tell you that?

A. He didn't say that.

Q. But he did say in this statement to you that, "I gave him a check to cover the 81 acres, although, as will be set out later, I am not sure it was the above-mentioned check dated April 5, 1954."

A. Yes, he said that, but he didn't mention a lease in that connection, waiting to get a lease.

Q. But he had gotten the lease on April 5th, 1954?

A. March 30 was the date of the lease.

Q. I understand, but the date of the check?

A. I see what you mean. Yes, sir.

Q. The date of the check, April 5, 1954? [257]

A. Yes, sir.

Q. He didn't tell you that he had issued a prior check dated March 20th, 1954, for the same amount, \$1,620?

A. No, sir. The story there was that he had stopped payment on a check.

Q. That's right.

A. And we were never able to find such a check,

(Testimony of Lloyd N. Johnson.)

and Mr. Neely could never clairfy, first, whether the check that was actually processed by Mr. Short, or taken by him, was the original check, or a later one.

Q. You know Mr. Short's signature?

A. Well, I have seen it on a number of documents, yes.

Q. Referring, Mr. Johnson, to Defendant's Exhibit M for identification, would you say that was Mr. Short's signature?

A. From my experience in examining documents said to have been signed by Mr. Short, I would say that looks like his handwriting.

Q. And that check was dated March 20, 1954?

A. Yes.

Q. Payable to Joe Short, \$1,620?

A. That appears to be correct, yes.

Q. Signed by Rex L. Neely? A. Yes.

Q. And the payment stopped? [258]

A. Yes.

Q. According to the advice of the bank?

A. What was the date of that again, sir?

Q. March 20th? A. Yes.

Q. Now, then, he issued another check on April 5th, 1954, for \$1,620. A. Yes.

Q. And that is after the time that he got this lease from Mr. Short, the Burns lease, or let us say the so-called Burns lease?

A. Yes, it is dated subsequent to the date of the lease.

Q. That's right. Mr. Neely, of course, never

(Testimony of Lloyd N. Johnson.)

called your attention to this first check on which payment was stopped?

A. No, sir, we asked Mr. Neely about that a number of times about just what had happened, but he didn't seem to be able to recall.

Q. He didn't have his checks, did he?

A. No, sir. At least he didn't produce the check. I don't know whether he had it or not.

Q. You never saw this, I assume, either? (Handing document to witness.)

A. Is this the sublease?

Q. Yes. [259]

A. No, sir, I have never seen that before today.

Q. That is supposedly a sublease from Neely back to Burns for that same property.

“Lessee has the right to plant any crop——”

Mr. Holohan: We object to his reading that to the Jury without its having been introduced, or any foundation shown for its admission.

The Court: All right.

Q. (By Mr. Whitney): Now, this statement, Government's Exhibit 24, of Mr. Neely, is substantially what he said during all of these conversations, condensed? A. That's right, sir.

Q. Condensed by you? A. Yes.

Q. And afterwards examined by Mr. Neely, but which he declined to sign until he could show a copy to his lawyer? A. Yes, sir.

Q. Did he say who his lawyer was?

A. No, sir.

(Testimony of Lloyd N. Johnson.)

Q. Now, do you believe what Mr. Neely said in this statement?

Mr. Holohan: I object to that as expressing an opinion that is the Jury's function.

The Court: He doesn't have to answer that.

Q. (By Mr. Whitney): He never inferred that any of these [260] checks that he gave Short were for anything except the cotton allotments which he got by virtue of the so-called Burns lease, isn't that right?

A. I think that is correct, sir, except the last check.

Q. The what?

A. The last check which contained an additional amount.

Q. I understand. And as you stated before, he said that he thought probably that allotment was worth more, and Mrs. Short was to be hospitalized, and he put in \$250 additional for Short?

A. That's right, sir.

Q. You noticed on that endorsement on the first Short check dated March 20th, 1954, "for deposit only, Joe Short business account."

A. I see it now, sir.

Q. Have you ever had occasion to examine Mr. Short's business account?

A. No, sir, I have never examined his bank or banking records at all.

Q. Now, Mr. Johnson, you know that cotton allotments were so dealt in in Pinal County and in Maricopa County in 1954, that is, if the farmer had

(Testimony of Lloyd N. Johnson.)

some land that had a cotton history, and he didn't have water enough to handle it, that he could sell his allotment, there was nothing illegal in that? [261]

A. If he went through the proper procedure.

Q. In 1954? A. In 1954, that's right.

Q. In 1955, the same thing?

A. If he had a reconstitution of his farm with the farm he leased?

Q. And in 1956 the same?

A. I think so, to the best of my understanding.

Q. And that obtained not only in Pinal County, but in Maricopa County?

A. The reconstitution, combining of farms, transferring?

Q. Yes. A. Yes.

Q. And the sale of cotton allotments?

A. Well, there would be a consideration in connection with such an arrangement.

Q. Nothing illegal about that?

A. If I understand your question fully, no, sir, as far as I understand the regulations.

Q. Do you know whether any overplant notices were sent to Mr. Neely during the year 1954?

A. I don't know of any sent to him in 1954, no, sir.

Q. And the fact of the matter is his cotton allotment was 408—— A. 400.8. [262]

Q. 400.8, pardon me. And if the Burns lease was a bona fide lease, that would be within his cotton allotment?

A. Under those circumstances, yes.

(Testimony of Lloyd N. Johnson.)

Q. That's right. That is, he planted less acreage than that in 1953? A. Yes, sir.

Q. In 1955 he overplanted? A. Yes, sir.

Q. After considering the extra acreage he got?

A. Yes, sir.

Q. How much? A. About 50 acres.

Q. About 50 acres? A. Yes.

Q. You heard the testimony here that some was destroyed. Do you know how much?

A. Mr. Neely told me he had destroyed 15 acres.

Q. And he told you he thought that was sufficient to bring it within compliance, did he not?

A. That's right.

Q. Now, in 1956, there was no cotton destroyed on the Neely place in Pinal County?

A. That's right.

Q. On Farm 647?

A. Yes, sir, that is right. [263]

Q. And you have heard the testimony of the other witnesses here that they have computed his penalty, but did not send it out, because it had been stopped by the State Office, or maybe some of your officials? A. I heard that, yes.

Q. Did you have anything to do with stopping it? A. No, sir.

Q. Do you know who did?

A. No, sir. I know nothing about that matter at all.

Mr. Whitney: I think that's all. I beg your pardon. I forgot one thing.

(Testimony of Lloyd N. Johnson.)

Now, on these ACP forms, when was the time to apply for the 1954 practices?

A. I couldn't be too sure on this, sir. I think there was a period in the fall of 1953 when you could apply for a 1954 practice. I don't remember the period, whether it was the month of December, or just when it was.

Q. And if he made application, then, in the fall of 1953, and didn't get paid for the 1954 until later, there would be nothing illegal about that, would there?

A. I am afraid I don't quite understand you, Mr. Whitney.

Q. Well, assuming that he made application.

A. Yes.

Q. On November 2nd, 1953. A. Yes, sir.

Q. And if he didn't get paid for that practice until later, did the work in March, 1954, or prior to March, between January and March, 1954, and didn't get paid for that until a later date, there would be nothing wrong about that, would there?

A. I am sorry, I don't know. There are certain dates in there that must be complied with, and I am not competent at this moment to say what they are. There are certain periods in which they have to do certain things.

Q. Referring to Defendant's Exhibit G for identification, what does that purport to be?

A. This is a form 201, which is a request for assistance on concrete ditch lining, dated November 2, 1953.

(Testimony of Lloyd N. Johnson.)

Q. And this Defendant's Exhibit H?

A. Well, that appears to be an original of the 247 which goes to the producer, dated November 5, 1953.

Q. Now, if the producer did that work between January and March, 1954, he would have complied with this situation, wouldn't he?

A. It would be my understanding that if he met all of the technical requirements for inspection by Soil Conservation.

Q. In other words, there is considerable technicalities in connection with that matter?

A. There are some, yes, sir. [265]

Q. Now, you don't mean to infer to the Jury here that he collected for two practices in 1954?

A. He received two checks in 1954.

Q. From the Pinal County——

A. For ACP practices.

Q. In Pinal County?

A. Yes. He received the payments in 1954. That's what I mean to say.

Q. But they weren't for 1954 practices?

A. No. One was a 1953 practice.

Q. And the other a '54? A. Yes, sir.

Q. Is there anything illegal about that?

A. If everything else is legal, there is nothing illegal about receiving two checks in one year, I guess.

Mr. Whitney: That's all.

(Testimony of Lloyd N. Johnson.)

Redirect Examination

Q. (By Mr. Holohan): This payment in early 1954, was that for this ditch practice, D to F, and B to C? A. That's right.

Q. And the subsequent payment later in the year 1954 was for this practice A to B? A. Yes.

Q. This ditch was already completed, A to B, before any application was ever made for it?

A. Mr. Neely said that that ditch was in in February or March, 1954.

Q. All right. Now, if I might, on one other point touched by counsel, the term "sale of allotments" was used. And you made reference to "re-constitution."

In order in Maricopa and in Pinal Counties, in order for a farmer in 1955 and 1956 to secure additional allotment, that is, his neighbor's, what was required there, just basically?

A. Well, it was basically a lease, or acquisition by owner of other farming land, which had on it a cotton allotment, if he was interested in the allotment, and those two tracts were combined in the ASC office for purposes of farming and operating the tracts as one operation.

Q. And by that means, then, the cotton history and cotton allotment for the current year for the acquired farm then passed to the, you might say the home place or main farm?

A. Well, to the one who leased the additional tract.

Q. All right. Then he had the option of plant-

(Testimony of Lloyd N. Johnson.)

ing it on his own place, or on the lease, or any combination thereof? A. That is correct.

Q. There was actually, each one of these farms is actually given a number, is it not? [267]

A. Each farm has a number, and on combination, one number is given to both tracts.

Q. And generally which number was given?

A. I don't know technically. I think it was the—oh, I don't know.

Q. Was there any action by the County Committee required then?

A. Yes, these combinations or reconstitutions had to be approved by the county committee.

Mr. Whitney: And by the State Committee?

The Witness: That I don't know, sir. I am not sure on that.

Mr. Holohan: That's all I have of you, Mr. Johnson.

Recross Examination

Q. (By Mr. Whitney): All of these matters in the Pinal County Office were eventually approved by the State Committee? A. No, sir.

Q. You don't know that? A. No, sir.

Q. Did your investigation show they were not?

A. My investigation didn't cover that.

Q. You wouldn't know that? A. No, sir.

Q. Are you a lawyer?

A. Not a practicing attorney, no, sir.

Q. Pardon?

A. Not a practicing attorney, no.

(Testimony of Lloyd N. Johnson.)

Q. But you studied law? A. Yes, sir.

Q. You know that a lease in Arizona for a year or less doesn't have to be in writing?

Mr. Holohan: I object to this. This is a matter of law.

The Court: Maybe he isn't an Arizona lawyer.

Mr. Whitney: That's all.

Mr. Stanfield: No questions.

(Witness excused.)

Mr. Hays: Mr. Dunkin, please.

DOYLE L. DUNKIN

called as a witness in behalf of the Government,
having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hays): Will you state your name, please. A. Doyle L. Dunkin, D-u-n-k-i-n.

Q. By whom are you employed, and in what capacity?

A. I am employed by the United States Department of Interior, Bureau of Indian Affairs, Supervising Highway Engineer.

Q. Were you ever employed in the Pinal County area by that same service?

A. Yes, sir, by the Gila -River-Pima-Maricopa Indian Agency, at Sacaton, Arizona.

Q. And when was that?

A. From 1952——

Q. Just approximately.

(Testimony of Doyle L. Dunkin.)

A. 1953, and I believe until September of 1954.

Q. Until September of 1954? A. Yes.

Q. And what were your duties down there?

A. Soil conservation, soil conservation engineer.

Q. You were a soil conservationist concerning what land?

A. Indian land of the Gila River-Pima-Mari-copa Indian Reservation, and the three other reservations under that jurisdiction.

Q. Were you concerned with any other than Indian land? A. No, sir.

Q. Do you know the Defendant Joe Short?

A. Yes, sir.

Q. Had you had dealings with him in the line of your work? [270] A. Yes, sir, I had.

Q. And what would that dealing be? What would your contact be?

A. The contact was one in which I, as a soil conservationist with the Indian Service, was interested in seeing some of our Indian farmers obtain PMA benefits with, or when they were entitled to it.

Q. That would be through the ASC Office?

A. Yes, sir.

Q. I will hand you Government's Exhibits D and E, 12-D and E. Let us take one at a time.

I will hand you Government's Exhibit 12-D, and ask you to examine that document, and calling your special attention to a written signature toward the bottom, and ask you if you have ever seen that before.

(Testimony of Doyle L. Dunkin.)

A. I can't say if I have seen this exact paper or not.

Q. Have you ever seen that writing there before?

A. If this is the same paper that Mr. Johnson showed me the first time he contacted me in Nevada, I have seen it.

Q. Is that your signature? A. No, sir.

Q. I hand you Government's Exhibit 12-E, and ask you to note the signature at the bottom of that document, that purports to be Doyle H. Dunkin. Is that your signature? A. No, sir. [271]

Q. What is your full name again?

A. Doyle Linden Dunkin.

Q. It isn't "H", it is "L", the middle initial, is that correct? A. Right.

Mr. Hays: That is all.

Cross Examination

Q. (By Mr. Whitney): Mr. Dunkin, do you know who signed these? A. No, sir, I don't.

Q. Do you know Mr. Neely?

A. I have been trying to——

Q. Pardon me? A. I can't say for sure.

Q. This is the gentleman sitting here.

A. Yes, sir. I knew who he was, now.

Q. Did you ever see him in 1954, 1955, and 1956 on business of any kind?

A. Not that I know of, sir, no, sir.

Q. He doesn't farm in the Indian reservation, that you know of?

A. Not that I know of, sir.

(Testimony of Doyle L. Dunkin.)

Q. And you don't know anything about these at all? A. No, sir. [272]

Mr. Whitney: That is all.

Mr. Stanfield: I don't think we have any questions.

Mr. Hays: That is all.

(Witness excused.)

Mr. Hays: May this witness be permanently excused?

Mr. Stanfield: No objection.

Mr. Whitney: No objection.

Mr. Hays: The Government rests, your Honor.

The Court: The Government rests.

Mr. Whitney: I would like to have the Jury excused.

The Court: All right. You may be excused from the Courtroom.

(The Jury retired from the courtroom.)

(The following proceedings were had out of the hearing and presence of the Jury.)

The Court: You may proceed.

Mr. Whitney: If the Court please, the Defendant Neely now makes a formal motion for a judgment of acquittal on each and every count in the indictment, on the grounds that the evidence is insufficient to show beyond a reasonable doubt, or at all, anything that would support a verdict of guilty.

Now, first, I want to call your Honor's attention [273] to Counts VII, VIII, IX, X, and XII, that is, the aiding and abetting count.

On those particular counts, if the Court pleases,

I don't know of any evidence in this record that would show that the Defendant Neely aided, abetted, or induced Short to do any of the acts charged in those particular counts.

And that, if the Court pleases, would also apply to the conspiracy count.

There is no sufficient evidence, even taking so-called overt acts that would in any way show an agreement, by inference even, between Short and Neely.

Insofar as Neely is concerned, on those particular counts, beginning with Count VII, clear through to Count XII, there is no evidence to support those counts, in my judgment.

Now, as to the first counts, if the Court pleases, Counts I, III, and V, that is, the charges that Neely paid a bribe to Short in the amounts of \$1620, \$1410, and \$1750, there is not the slightest evidence here that that took place, on the statement of Short that is in evidence here, and on the statement of Neely that the Government put in evidence.

There is not any evidence at all on that situation. Short completely exonerates him. And in this statement, which is quite a lengthy statement, but this is the nub of it, it says:

"During each of the three crop seasons mentioned [274] above, I accepted money from cotton producers in exchange for obtaining additional cotton allotments for them. I led these producers to believe that I obtained such allotments either from my own farm or through a deal with other producers who had allotments which were unplanted. They trusted

me, and, as far as I know, they believed my representations."

Neely's statement is to the same effect, and if you take both statements out, there is no evidence at all to support a charge of bribery, to say nothing of these aiding and abetting charges, and to say nothing of the conspiracy charges.

I honestly believe that this Court should direct a verdict, or, rather, should enter a judgment of acquittal on each of the counts in these indictments, and particularly do I say that with reference to all the counts, commencing with Counts VII, or Count VII, which has to do with the aiding and abetting, and Count XII, the conspiracy.

There is no evidence in those, if the Court pleases, that the Jury could even infer beyond a reasonable doubt that Neely is guilty of anything in connection with those particular counts.

The Court: Motion denied.

We will have our afternoon recess at this time.

(The afternoon recess was taken.) [275]

(The following proceedings were had in the hearing and presence of the Jury.)

The Court: You may continue.

Did you wish to make an opening statement, Mr. Whitney?

Mr. Whitney: Yes.

(Thereupon Counsel for the Defendant Neely made his Opening Statement to the Jury.)

The Court: Mr. Stanfield, do you wish to make an opening statement?

Mr. Stanfield: The Defendant Short waives his opening statement.

The Court: All right.

Mr. Whitney: Mr. Neely, will you be sworn, please.

(Thereupon the Defendant Rex L. Neely was sworn as a witness.)

Mr. Whitney: Ladies and Gentlemen, as I told you, I am going to present to you the statements before Mr. Neely testifies.

These statements are all in evidence here as Defendant's Exhibit "J," Government's Exhibit 25, and Government's Exhibit 24.

I will read them in the order in which they are given, not by whom.

The first is Statement of Joe L. Short, which was [276] identified by Mr. Kennedy, which was signed by Joe L. Short, apparently, and witnessed by Mr. W. A. Stanfield, Mr. Short's attorney; by Reed S. Cardon, and by Doyle S. Kennedy, Special Agents, United States Department of Agriculture, 1000 Geary Street, Room 101, San Francisco, California.

This Statement is dated at Eloy, Arizona, January 14, 1957.

(Thereupon Defendant's Exhibit J in evidence, the Statement of Joe L. Short, was read to the Jury by Mr. Whitney.)

Mr. Whitney: Of course, he has got round figures in there, and we have already shown what they are.

Now, the next Statement in point of date is on

January 22nd, 1957, which was following a conversation at Mr. Neely's house, I believe.

It is headed "Candler, Arizona, January 22, 1957." This is in the handwriting, by the way, of the agent.

(Thereupon Government's Exhibit 25 in evidence, Statement of Rex L. Neely, was read by Mr. Whitney to the Jury.)

Now, the last statement in point of time which is introduced here as Government's Exhibit 24, which is the last statement taken from Rex L. Neely, which is a condensation [277] prepared by Mr. Johnson from a long-winded conversation, or long-winded conversations held over a tape recorder, which I think he said would take five hours to play.

This is dated at Chandler, Arizona, March 24, 1957.

(Thereupon Government's Exhibit 24 in evidence, Statement of Rex L. Neely, was read by Mr. Whitney to the Jury.)

Mr. Whitney: This statement is neither signed nor witnessed.

REX L. NEELY

the Defendant herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Whitney): Your name is Rex L. Neely?
A. Yes, sir.

(Testimony of Rex L. Neely.)

Q. And you are one of the Defendants in this action? A. Yes, sir.

Q. Where do you reside, Mr. Neely?

A. 699 North Washington, Chandler, Arizona.

Q. How long have you resided in this county?

A. All my life.

Q. How old are you? A. Thirty-three.

Q. I suppose you are a family man?

A. Yes, sir, three children.

Q. When did you first meet Joe L. Short?

A. It was in the ASC Office. Nineteen——

Q. In Casa Grande?

A. Yes, in Casa Grande. In 1954, I believe.

Q. And prior to the time of the transactions you had with him, were you acquainted with him at all any to speak of? A. No, sir, I was not.

Q. How many times had you seen him prior to that time?

A. Not over once or twice, probably once.

Q. Now, in 1953, there was no restrictions on cotton, is that right? A. That is right.

Q. In 1954, the restrictions went on?

A. Yes, sir.

Q. And at that time, did you make inquiry about getting some additional cotton allotments?

A. Yes, I did.

Q. And who did you make that inquiry of?

A. Well, it kind of came to me, I mean, in a round about way. I was there at the ranch, and an acquaintance of mine [279] that I knew when I lived in Gilbert and Chandler, Mike Watson, came

(Testimony of Rex L. Neely.)

by and we got to talking, and I told him that I was looking for a place to lease, to get some cotton.

Q. Looking for additional acres?

A. Additional cotton acres to put on my farm.

Q. And what did he say to you?

A. He told me——

Q. Not what he said to you, but did he refer you to anybody?

A. I believe the name Bill Burns was mentioned.

Q. And what else did he say?

A. And that I was to contact Mr. Short at the ASC Office for further information on the farm.

Q. Did Mr. Watson indicate to you in any way that there was anything wrong with Mr. Short?

A. No, sir.

Q. And you contacted Mr. Short?

A. I called him at the office to see if the allotment was still available.

Q. What did you say? You called him on the telephone? A. Yes, sir.

Q. When was that?

A. That was shortly after I talked to Mr. Watson. He indicated that it was still available, and that he would check to make sure, that I was to contact him later in regards to [280] the allotment.

Q. That was sometime prior to the 20th of March, 1954? A. Yes, sir.

Q. You did contact him later?

A. I did by phone.

Q. And do you remember the date?

(Testimony of Rex L. Neely.)

A. I believe it was along the middle of March, I believe.

Q. Was it prior to the time that you gave him a check for \$1,620? A. Yes, it was.

Q. Referring to Defendant's Exhibit M for identification, Mr. Neely, was it prior to the date of that check, which is March 20, 1954? A. It was.

Q. And when did he let you know that he could get you some additional acreage with reference to that date?

A. I believe it was around the 18th or 19th.

Q. And then did you go to see Mr. Short?

A. I did.

Q. And at that time, what took place?

A. He stated that he had contacted Mr. Burns, that he was handling—he stated that this farm didn't have sufficient water for the cotton allotment on it. Therefore, Mr. Burns had released the acreage for him to take care of, to re—— [281]

Q. Did he say how much that acreage was to be released, how much of it was to be released?

A. It was 80.1. 80 acres, approximately.

Q. Or 81 acres maybe? A. Yes.

Q. And at that time, that was on the 20th of March, was it? A. Yes.

Q. At that time, did you give Mr. Short this check? A. I did.

Q. And do you know Mr. Short's endorsement?

A. I have seen it. That is his signature.

Mr. Whitney: We offer this in evidence, if the Court please.

(Testimony of Rex L. Neely.)

Mr. Holohan: We object to it on foundation not having been laid for the entire document yet. I note besides the check, there is another document attached to it, for which there has been no foundation laid, as I understand it.

Mr. Whitney: If you get that technical, I will lay it.

The Court: Is that the notice from the bank?

Q. (By Mr. Whitney): When you stopped payment on this check, did you get this notice from the bank afterwards? A. Yes.

Q. And was that attached to the check? [282]

A. Yes, sir.

Q. That showed that payment was stopped, "Returned Unpaid" A. Yes.

Mr. Whitney: Is that all right, Mr. Holohan?

Mr. Holohan: No objection now.

The Court: It may be received.

The Clerk: Defendant's Exhibit M in evidence.

(Said Check and Advice of Stop Payment was received in evidence and marked as Defendant's Exhibit M.)

Q. (By Mr. Whitney): Now, after you gave Defendant's Exhibit M in evidence, this check dated March 20, 1954, for \$1,620, how did you come to stop payment on that check?

A. As I understood it, through the transferring of cotton allotment from one farm to the other, it was necessary for a farmer to get a lease from the other farm, or farmer.

(Testimony of Rex L. Neely.)

Q. From somebody. Who told you that, do you remember? A. Mr. Watson told me that.

Q. And did you discuss that with anyone else?

A. Yes, sir, I discussed it with Mr. Asher at my bank.

Q. Mr. Asher is the manager of the Mesa Bank?

A. The Mesa Valley National Bank.

Q. Valley National Bank of Mesa?

A. Yes.

Q. And what did Mr. Asher say? [283]

A. I went up there to the bank to give a reason why I stopped payment on the check, and telling him the situation. And I told him that I was going to request a lease from the farm, and that when I did, that I would let him know, or re-issue another check.

Q. I see.

A. He indicated that if I had a lease, that in his opinion it would be all right.

Q. After that check and that payment was stopped, did you see Mr. Short again?

A. Yes.

Q. When with relation to this date of March 20th?

A. I believe it was the 22nd or 23rd.

Q. And what did he say, and what did you say, to Mr. Short?

Who was present?

A. Mr. Short and myself.

Q. All right. And where did this conversation take place?

(Testimony of Rex L. Neely.)

A. At 11-mile Corner, there at the front of a grocery store.

Q. And what did you say to Mr. Short?

A. Well, I told him that I wanted a lease on the Burns farm, that I understood that is the way allotment could be transferred. [284]

Q. What did he say?

A. He said that he would get in contact with Mr. Burns, and get a lease from him.

Q. Was that about all the conversation then?

A. He told me that, well, I questioned him about this lease, and he indicated to me that he would get a lease, and it was all right.

Q. And then when did you see Mr. Short again?

A. At the ASC Office, I believe in April.

Q. You say sometime early in March?

A. Early in April.

Q. I mean early in April. A. Yes.

Q. Referring you to Government's Exhibit 15 in evidence, is that the lease that he gave you?

A. It is.

Q. And that is the one that you turned over voluntarily to the Government Agents, Mr. Johnson and Mr. Kennedy, or one of them?

A. Yes, sir.

Q. And that lease is signed by, purportedly, by W. R. Burns? A. Correct.

Q. And was signed at the time you got it?

A. Yes, it was. [285]

(Testimony of Rex L. Neely.)

Q. And then you signed it? A. Yes, sir.

Q. Do you remember Mr. Short witnessing your signature? A. Yes, sir.

Q. And do you remember that this Lena H. Andrews was on there witnessing Mr. Burns' signature?

A. I believe it was. I am almost certain it was.

Q. Anyway, when you got the lease, it was on there? A. Yes.

Q. That is the lease that you received?

A. Yes.

Q. At that time, that was early in March. You gave him a check the same day? A. Yes, sir.

Q. I am handing you now Government's Exhibit 14-A in evidence, which purports to be a check on the Valley Bank of Mesa, for \$1620, dated April 5, 1954, payable to Joe Short, for \$1620.

Is that the check you gave him?

A. Yes, sir.

Q. And that is Mr. Short's signature, as far as you know? A. As far as I know, yes, sir.

Q. Now, then, at the time that you got that lease, did you have any idea that there was anything wrong? A. No, sir. [286]

Q. With the Burns lease? A. No, sir.

Q. And after you got the lease, of course you went on farming? A. Yes.

Q. Do you remember receiving the allotment notices? A. Yes, sir.

Q. Do you remember they were the ones you

(Testimony of Rex L. Neely.)

turned over to Mr. Kennedy or Mr. Johnson, or one or the other of them?

A. I believe I can identify them, or remember the ones.

Q. I hand you Government's Exhibit 17-A for identification. Do you remember receiving that notice?

A. Yes, sir, I do.

Q. How did you receive it?

A. In the mail.

Q. From the ASC Office?

A. Yes, sir.

Q. That shows 252.2 acres allotted?

A. Correct.

Q. And referring to Government's Exhibit 17-B, that was also received by you?

A. Yes, sir, it was.

Q. In the mail?

A. In the mail.

Q. And that shows 319.8 acres? [287]

A. Yes.

Q. Then you received a notice for 400.8 acres?

A. Yes, sir, I did.

Q. That takes in the 81 acres that you leased from, or, rather, that you thought you leased from Burns?

A. Yes, sir, that is right.

The Court: The Court will stand at recess until ten o'clock Tuesday morning. Tuesday morning at ten o'clock.

Keep in mind the Court's admonition.

(Thereupon an adjournment was taken to Tuesday, September 16, 1958, at the hour of ten o'clock A.M.) [288]

Tuesday, September 16, 1958, Ten o'clock a.m.

The Court: You may proceed.

Mr. Whitney: If the Court please, Mr. Hays says he has no objection, and I would like to withdraw Mr. Neely from the stand for the purpose of putting on three short character witnesses.

The Court: Very well.

Mr. Whitney: Mr. Burt Lewis. [289]

BURT LEWIS

called as a witness for the Defendant Neely, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Whitney): What is your name, please? A. Burt Lewis.

Q. Where do you reside?

A. Chandler, Arizona.

Q. What is your business?

A. Farming, and mostly real estate.

Q. Do you hold an official position down there?

A. Mayor of Chandler.

Q. Are you acquainted with Rex L. Neely?

A. Yes, sir.

Q. How long have you known him?

A. Well, I would say all of his life.

Q. Do you know his reputation in the community in which he resides for honesty, integrity, and truth and veracity? A. Yes, sir.

Q. What is it, good or bad? A. Good.

Mr. Whitney: You may cross examine.

Mr. Holohan: No questions. [290]

Mr. Whitney: May I excuse the witness?

The Court: He may be excused.

(Witness excused.)

Mr. Whitney: Mr. Hoopes.

JOHN HOOPES

called as a witness for the Defendant Neely, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Whitney): Will you state your name, please. A. John Hoopes.

Q. Where do you reside, Mr. Hoopes?

A. I reside south of Mesa.

Q. Are you acquainted with Rex L. Neely?

A. I am.

Q. How long have you known him?

A. Fifteen, sixteen years.

Q. Pardon? A. Fifteen or sixteen years.

Q. Do you know his reputation in the community in which he resides for honesty and integrity?

A. I do.

Q. What is it? Good or bad? [291]

A. Good.

Q. Do you know his reputation in the community in which he resides for truth and veracity?

A. I do.

Q. What is it, good or bad? A. Good.

Mr. Whitney: You may cross examine.

Mr. Hays: No questions.

(Witness excused.)

Mr. Whitney: Mr. Asher.

WILLIAM I. ASHER

called as a witness for the Defendant Neely, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Whitney): Will you state your name, please. A. William I. Asher.

Q. Where do you reside, Mr. Asher?

A. In Mesa.

Q. What is your business?

A. I am Vice President and Manager of the Valley Bank there.

Q. At Mesa? [292] A. In Mesa.

Q. Do you know Rex L. Neely? A. Yes.

Q. How long have you known him?

A. About ten years, I believe.

Q. And do you know his reputation in the community in which he resides for honesty and integrity? A. Yes.

Q. What is it, good or bad? A. It is good.

Q. And do you know his reputation in the community in which he resides for truth and veracity?

A. Yes.

Q. What is it, good or bad?

A. It is very good.

Mr. Whitney: You may cross examine.

Cross Examination

Q. (By Mr. Hays): He is a good customer of your bank, isn't he? A. Yes, sir.

Mr. Hays: That is all.

(Witness excused.)

Mr. Whitney: Mr. Neely, will you take the stand again. [293]

REX L. NEELY

resumed the stand, and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Whitney): Mr. Neely, did you have any business dealings with Mr. Short in 1955?

A. I did.

Q. And what were those dealings?

A. I leased a farm from Mr. Short.

Q. And did you receive from Mr. Short — first, what did you say to Mr. Short?

A. Well, I had previously leased it for the 1954 crop.

Q. For the Burns farm?

A. For the Burns farm, and along about that time the 1955 allotment notices were being sent out. I contacted him at the ASC Office and inquired if the Burns farm allotment lease was going to be available.

Q. Do you remember what your first allotment notice was in 1955, for the crop year 1955?

A. The first notice was 306.1.

Q. And after you saw Mr. Short with reference to the Burns farm, what did he say in that regard?

A. He said on the Burns there would be less acreage in 1955 than there was in 1954, indicating—— [294]

Q. Did he tell you what that acreage was that you could have the allotment for?

(Testimony of Rex L. Neely.)

A. Yes, 70.6.

Q. And at that time, I believe, according to the Government's evidence, you gave him a check for \$1,410? A. Yes, sir.

Q. And that check is in evidence here as Government's Exhibit 14-B, right?

A. Yes, sir, that is right.

Q. Now, that check figures out on the basis—on what basis per acre did he say you could have that?

A. \$20 an acre. I am sure that is correct.

Q. That check is \$1,410. Fourteen hundred ten dollars would be seventy and one-half acres, is that right? A. Yes.

Q. Now, referring to Government's Exhibit 18-A in evidence, did you receive that allotment?

A. Yes, sir, I did, in the mail.

Q. All right. I notice that it says Allotment of 306.1 Acres there, and then there is under that the figure of 70.6.

When you received that in the mail, was that 70.6 thereon, do you remember?

A. I don't remember that it was on there.

Q. Do you know who put that on there?

A. No, sir, I do not. [295]

Q. That would leave you, then, with a total allotment, taking the Burns allotment into consideration, of 376.7 acres? A. Correct.

Q. Now, in 1955, do you know how many acres you planted? A. I planted—

Q. Pardon?

A. I planted 300—approximately 380 acres.

(Testimony of Rex L. Neely.)

Q. And did Mr. Short ever call your attention to the fact that in 1955 that you were overplanted?

A. Yes, he did.

Q. When was that?

A. I am not sure of the date. I believe it was August the 18th.

Q. August 18, 1955?

A. I am pretty sure that is correct.

Q. Now, what did Mr. Short tell you at that time?

A. He notified me that I was overplanted.

Q. On the short staple cotton?

A. On the short staple cotton.

Q. And did he say how much you were overplanted?

A. I don't believe he did. I am sure he didn't.

Q. Well, did he say anything about your having to destroy some cotton? A. Yes, he did. [296]

Q. What did you do after he told you that?

A. I went to the farm and instructed that 15 or 20 acres was to be, which I thought was to become within my allotment.

Q. In other words, after you had planted, I mean after you had destroyed that 15 or 20 acres, you thought that you were in the allotment of 306.1 acres, plus the amount of what you thought you were getting from the Burns farm, of 70.6, or 70.5?

A. Yes, sir.

Q. You thought you were in compliance?

A. Yes, sir.

(Testimony of Rex L. Neely.)

Q. Do you know whether or not Mr. Short afterwards measured your allotment? A. No, sir.

Q. I mean your farm for that year?

A. No, sir, I do not know for sure.

Q. Did you ever see Mr. Short on the farm?

A. I never did see him personally on the farm.

Q. Well, did you know he had been out there?

A. No. I am sure he said that he had been on the farm.

Q. After he had measured it—when did you pay him this \$10, Mr. Neely, for measuring?

A. I believe it was on the day that I destroyed this cotton, on August 18th, the same day.

Q. And after you destroyed it, or before, or at the time? [297]

A. I believe it was at the time.

Q. And that \$10 was given to him for what purpose?

A. For remeasuring the farm. That was the ASC charge for remeasuring a farm.

Q. And do you know whether you got a receipt for that ten dollars, or not?

A. I am not sure that I did. I believe so, but I was unable to find it.

Q. Now, after you paid that remeasurement fee, whenever it might have been, along in there, you never received any overplant notice?

A. No, sir, I did not.

Q. Now, there has been an exhibit introduced by the Government, known as Government's Exhibit

(Testimony of Rex L. Neely.)

11-B in evidence. Is that your signature on that exhibit? A. Yes, sir, it is.

Q. And did you sign it on or about the date that is shown there?

A. Yes, I believe that is the date. I am not sure.

Q. At the time that you signed this, did you read it? A. No, I did not.

Q. You didn't notice the figures there, 426.5 acres? A. No, no I did not.

Q. I will ask you if at the time you received that, was any of the writings on there, were any of those writings on [298] there showing destroyed cotton, in red ink?

A. No. I am sure they weren't.

Q. It wasn't there. That shows that you had destroyed 120.4 acres. That was not on there?

A. No, sir, I am sure it was not.

Q. Do you know how it got on there?

A. No, I have no idea.

Q. Did you have anything to do with its getting on there? A. No, sir, I didn't.

Q. Now, you never received, as I understand it, any notice of overplant for 1955? A. No, sir.

Q. And you never received any notice of penalty for 1955? A. No, sir.

Q. I believe you testified that after you had plowed up that cotton, that you actually thought you were in compliance? A. Yes, sir.

Q. Did you plant, if you know, the 426 acres that is shown on this Government's Exhibit 11-B? You

(Testimony of Rex L. Neely.)

told me, I believe, that you only planted 300 and some acres?

A. I believe I planted 388, from 300 to 388.

Q. So that after you had destroyed the 15 or 20 acres, you thought that you were in compliance, and within the 376.7 acres? A. Yes, sir. [299]

Q. Which was the allotment to you, plus the allotment from the so-called Burns farm?

A. Yes, sir.

Q. Which we now know never existed?

A. Yes, sir.

Q. Did you know that the Burns farm never existed in 1955? A. No, I didn't.

Q. Why didn't you ask—I will do a little cross examining for the Government—why didn't you ask Mr. Short for a lease, or did you?

A. I was told that a lease under one year was not required to be in writing.

Q. In your statement to the Government, returning to 1955, I believe you stated that you never asked anything further about the lease?

A. That is correct.

Q. After you had asked him if the Burns farm was still for lease? A. That is right.

Q. After you had told him that you asked for reduced acreage. A. Yes, sir.

Q. Now, concerning Extra Long Staple cotton, do you remember, Mr. Neely, what your allotment was? [300] A. For the 1955?

Q. In 1955.

A. I believe it was 300—I mean 3.8.

(Testimony of Rex L. Neely.)

Q. How much was planted?

A. I believe it was 5.1.

Q. Did you receive any notice of overplant there?

A. No, sir, I didn't.

Q. Did you receive any statement from the Government asking you to pay a penalty for that overplant?

A. No, sir, I did not.

Q. Now, in that year 1955, you did overplant extra long staple cotton in Maricopa County?

A. Long staple cotton?

Q. In Maricopa County, yes.

A. No, sir.

Q. Did you overplant short staple?

A. Yes, sir.

Q. Do you remember the amount of that overplant?

A. 9.3 acres.

Q. Nine point what?

A. Three.

Q. Referring to Defendant's Exhibit number K, I know you can't remember, because this shows 9.8 acres.

A. Oh, well, that is correct, then.

Q. And you received that from the Department of [301] Agriculture, the Maricopa County ASC Office?

A. Yes, sir, I did.

Q. Showing that you planted that, and you were assessed a penalty of 17.7 cents a pound?

A. Yes, sir.

Q. And referring to Defendant's Exhibit L in evidence, is that the check that you paid the Treasury of the United States for that overplant?

A. That is the check.

(Testimony of Rex L. Neely.)

Mr. Whitney: I now, Mr. District Attorney, offer Defendant's Exhibit K in evidence.

Mr. Hays: No objection.

The Court: It may be received.

The Clerk: Defendant's Exhibit K in evidence.

(Said Letter dated 9/12/55 was received in evidence and marked as Defendant's Exhibit K.)

Q. (By Mr. Whitney): Now, if you had received a notice of overplant for 1954, or 1955, with an assessment of the penalty, would you have paid it? A. I most certainly would have.

Q. Did you make any quarrel about that Government's measurement of your Maricopa County Farm? A. No, I didn't.

Q. Did they ask you to plow up any of that excess acreage in Maricopa County, or just did they measure it and send you [302] a bill for the penalty?

A. They measured it and sent a notice of the penalty.

Q. Now, with reference to 1954, the 1955 marketing card, referring to Government's Exhibit 16-A in evidence, apparently it is the 1954 Upland Cotton Marketing Card. That is your signature on that card? A. Yes, it is.

Q. And where did you get it?

A. I got it at the ASC Office at Casa Grande.

Q. And did you note on there the amount of your 1954 allotment, and your actual planted cotton at the time you took the card?

(Testimony of Rex L. Neely.)

A. I don't recall that I did.

Q. Are you in the habit of reading what you sign when you go into that office?

A. No, not word for word.

Q. You notice it says the 1954 allotment, 400.8 acres, which is correct, assuming that the Burns lease was not a fake, and that you only planted 388.9 acres?

A. Yes, sir.

Q. Then you were not overplanted in 1954 on Upland Cotton?

A. That is correct.

Q. If the Burns lease was bona fide, as far as you were concerned?

A. That is correct. [303]

Q. Now, on your 1955 Upland Marketing Card, which is Defendant's Exhibit 16-B in evidence, where did you get that—that is your signature down there, isn't it?

A. Yes, sir.

Q. Where did you get that card?

A. I got this at the Casa Grande ASC Office.

Q. You got it at the time you signed your Form 578?

A. Yes.

Q. And that shows on it a 1955 allotment of 306.1 acres, and planted cotton, 306.1.

How do you account for that?

A. I have no knowledge.

Q. Did you notice that when you got it?

A. I don't believe I did. I am sure I didn't.

Q. Now, Mr. Neely, referring to Government's Exhibit 11-C in evidence, which is the Report of the 1955 Acreage of Long Staple Cotton, that is your signature?

A. Yes, sir, it is.

(Testimony of Rex L. Neely.)

Q. Is that Mr. Short's signature, or do you know?

A. I believe that is, it looks like it is.

Q. And you got that, when you got your marketing card for 1955 Long Staple?

A. I signed this, yes.

Q. Do you remember that this acreage was out there, or did you look at it particularly? [304]

A. I didn't look at it actually. Actually, I didn't know what the form was.

Q. You know it was a Form 578?

A. That's all I knew.

Q. Did you notice those red figures on the Destroyed Final, in red ink, did you notice whether or not those were on that exhibit number 11-C at the time you signed it?

A. I don't believe they were. I don't remember seeing them.

Q. Well, you would have been apt to see them if they were in red ink, wouldn't you?

A. Yes, sir, I would have. I believe I would have.

Q. Now, referring to Government's Exhibit 9-A in evidence. You have never seen that before, have you?

A. No, I haven't.

Q. It is not signed by you?

A. No. No signature.

Q. It has to do with the W. R. Burns farm, right?

A. That's what it says, yes.

Q. You don't know anything about that?

A. I know nothing about that.

(Testimony of Rex L. Neely.)

Q. You had nothing to do with making up the figures on that, or anything about it, did you?

A. No, sir. I have never seen it.

Q. You never discussed it? [305]

A. Never discussed it.

Q. You don't know anything about it?

A. No.

Q. Referring to Government's Exhibit 11-A, which apparently is Report of 1954 Acreage. It shows 389.9 acres.

Did you ever see that before, that you know of?

A. No, I have never seen that.

Q. At least that is not signed by you?

A. There is no signature.

Q. Who is this John Murphy? Is that it, Murphy?

A. I presume that is it.

Q. Who was he?

A. I don't know him. I don't know anybody by that name.

Q. Did you have anything to do with preparing that report?

A. No.

Q. Was it ever discussed with you?

A. No.

Q. Do you know anything about it at all?

A. Don't know anything about it.

Q. Now, there is something in this statement that you made to the Government Agents, or, rather, that was written up by the Government Agents that you didn't sign, but that you looked over.

With reference to ginning some of your cotton at

(Testimony of Rex L. Neely.)

the Chandler Gin Company, that is located in Maricopa County, [306] isn't it? A. Yes, sir.

Q. On an eligible card from Pinal County. Will you tell the Jury how that came about, if you know.

A. This cotton that was in Maricopa County, and it was ginned at the same gin that I gin my Pinal County farm cotton on, and I don't believe I was aware at the time that you couldn't market the same cotton on the same Marketing Card from two counties. I don't believe I was aware of it at that time.

Q. There was no charge in the indictment covering that. I just simply asked, because it is in this statement you made.

Now, Mr. Neely, when you placed this Pima or long staple cotton, was some of that placed under loan, or do you remember?

A. I believe some of it went under loan.

Q. And did you at that time believe there was any irregularity in getting a loan on that cotton?

A. No, I didn't, not at that time.

Q. When did you first hear about that, that there might be an irregularity?

A. I believe it was in December.

Q. Of what year? A. 1956.

Q. Nineteen which? [307] A. 1956.

Q. That is after the Agent had talked to you?

A. Yes, sir.

Q. Up until the time that he talked to you, did you have any idea that there was anything wrong with this so-called lease of the Burns farm, or re-

(Testimony of Rex L. Neely.)

ceiving a cotton allotment through what you thought was the Burns farm?

A. No, I didn't. I thought everything was open and above board.

Q. When did you first become suspicious of that?

A. My first suspicions was on December, I believe it was the 19th, I had some suspicions then. And then on the 28th of December of 1956.

Q. 1956?

A. Yes. I knew that I was reasonably sure that it was all a phoney deal.

Q. Now, Mr. Neely, do you remember what your allotment was for the year 1956 of short staple cotton? A. 366.

Q. 300 and what? A. 366.7.

Q. And was that the first allotment notice you got, or the second, or do you remember?

A. I believe that was the first.

Q. Referring to Government's Exhibit 19 in evidence, [308] this allotment notice, apparently signed by J. E. Beggs on December 1st, 1955, addressed to you at Chandler, was 306.7. Do you remember getting that? A. Yes, I do.

Q. How did you receive it, do you remember?

A. I received it in the mail.

Q. Did you receive another allotment notice after that?

A. I am not sure. I don't think I did.

Q. At that time your allotment was 306.7, and you got an extra 60 acres, was it?

(Testimony of Rex L. Neely.)

A. Yes, sir, from the Burns farm lease allotment.

Q. For 1956? A. Yes.

Q. That would make it 366.7?

A. Yes, sir.

Q. Tell us the conversation you had with Mr. Short with reference to securing that second 60 acres.

A. As I remember, it was in, I believe it was in December of 1955, I contacted Mr. Short at the ASC Office, and asked him the availability of the Burns farm lease, the allotment off the Burns farm.

Q. What did he say?

A. He indicated that he would have to see Mr. Burns, that I should contact him later.

Q. Did you contact him later? [309]

A. Yes, I did.

Q. And what time was that, if you remember. I realize you can't give the exact date.

A. It must have been along the, pretty close to the 20th, I would just guess.

Q. Of December? A. Yes.

Q. Just to refresh your memory, I am handing you Government's Exhibit 14-C in evidence, which is a check dated December 9, 1955, payable to Joe Short for \$1750. Is that the check you gave him?

A. Yes, it is.

Q. And that is the check you gave him at the last conversation you had with him about that farm?

A. Yes, it is.

Q. At that time, did you think, or did you be-

(Testimony of Rex L. Neely.)

lieve, rather, that this was a bona fide allotment from the Burns farm, or a bona fide lease?

A. I most certainly did.

Q. Did you have anything in your mind that would cause you to believe that it wasn't a bona fide transaction.

A. Not a thing in the world, I did not.

Q. Now, referring to the check covering the 1955 due, which is dated November 22nd, 1954, payable to Joe Short, and signed by you, and being Government's Exhibit 14-B in evidence, [310] I see a notation in the corner there. Do you know what that is? I can't read it.

A. "Cotton base," I believe. "Base."

Q. Or "lease"? A. Or "lease."

Q. You wrote it, didn't you?

A. I believe it is "base. Cotton base."

Q. Did you write it, or not? A. Yes.

Q. Now, to finish up with this 1956. In connection with the Form 578 which the Government has introduced here in evidence, which shows 477.7 acres, you stated that you never saw that on the Government's Exhibit 11-D?

A. That is correct.

Q. And did you ever receive an overplant notice for your 1956 overplant?

A. No, sir, I did not.

Q. Do you know whether it was measured up?

A. No, not through the—not until December, I believe it was December 28th when H. L. Mathis and Ray Wolfe came out.

(Testimony of Rex L. Neely.)

Q. What date was that?

A. I believe it was December 28.

Q. And who measured it, Mr. Mathis?

A. Mr. Mathis and Mr. Wolfe in the State Office. [311]

Q. Did you see them out there measuring it?

A. Yes, I gave him permission to go ahead.

Q. Did you talk to them? A. Yes.

Q. What was said? A. They said——

Q. Was there anybody else present? Just you and Mr. Mathis and Mr. Wolfe?

A. No, there was not.

Q. What was said?

A. They said they were sent out by the State Office to measure my farm.

Q. What did you say?

A. I told them that, I told them to go ahead and measure it. I asked them if they knew of the extra cotton acres from the Burns farm.

Q. Had you already finished picking at that time?

A. We were practically through, yes.

Q. Was there any further discussion had with Mr. Wolfe and Mr. Mathis, or either of them, with reference to what was to be done about this over-plant?

A. Yes, I believe that was on a Friday. They came out and measured my farm, and they said they had some other farms to measure the following day, so I contacted H. L. at his home. [312]

Q. Contacted who? A. H. L. Mathis.

(Testimony of Rex L. Neely.)

Q. On what?

A. By phone. I believe it was Saturday evening, and asked him if I could meet him Sunday there at his home.

Q. What did you ask him, or did you see him?

A. Yes, I went to Casa Grande that Sunday, and Mr. Wolfe was there, and I wanted to find out the result of the measurement.

I asked him at this time if there was, if I couldn't pay my penalty and get this thing straightened up.

Q. What did he say?

A. He didn't know for sure. He didn't imply that it could be, or would be.

Q. You heard Mr. Mathis and Mr. Wolfe testify here that the penalty was practically made up, or made up and somebody stopped him from sending it out to you, that is, the notice of your penalty on account of overplanting in 1956?

A. Yes, I heard that testimony.

Q. You yourself didn't know that it had been made out at the bank? A. No.

Q. But expected to get it?

A. Well, I called H. L. at the office.

Q. You mean H. L. Mathis? [313]

A. H. L. Mathis at the office sometime during the following week, and asked him if he had made out a penalty notice,

He inferred that he had, but that he couldn't go further, because he was instructed to hold up on the notice on the penalty.

(Testimony of Rex L. Neely.)

Q. Do you know how much he said you were overplanted in the year 1956?

A. I believe he said over a hundred acres.

Q. Now, at that time, Mr. Neely, was there any discussion with Mr. Mathis about this additional 60 acres that you got under the purported Burns lease?

I say "purported," because it now develops there was no such a thing as the Burns farm, except on the books.

A. I stated that I had a lease from Mr. Burns, 60 acres.

Q. And did you claim that you were not as much overplanted as they claimed, in view of that lease?

A. No.

Q. Or was there anything said about it?

A. No, I didn't claim that.

Q. You didn't discuss it. Did you ever ask Mathis the results of the measurement?

A. Yes.

Q. And at that time, you mentioned to him and Mr. Wolfe about this additional, that you had a lease for an additional 60 acres? [314]

A. Yes, sir, I did.

Q. And you told that to the government agents at the time when they examined you, or talked to you in, oh, when did they talk to you? In March, or before?

A. Yes, I believe the first part.

Q. Now, with reference to this first Statement that was introduced in evidence, which, incidentally I never heard of before, Government's Exhibit 25 in evidence; this statement is dated January 22nd,

(Testimony of Rex L. Neely.)

1957, Chandler, Arizona. Do you remember that now? A. Yes, it was in January.

Q. Why didn't you tell me about that statement? Did you forget it? A. I think I forgot it.

Q. Whatever the circumstances under which that statement was given, I see it is signed by Mr. Doyle H. Kennedy and Lloyd N. Johnson, as witnesses, and apparently that is your signature there?

A. Yes, that is right.

Q. How did they come to get that statement?

A. I gave them that statement in the ASC Office, the date shown there. I was in the office on some other business, and they heard, I believe, that I was in there, and they called me in in the back, in their office.

Q. Was that down at Casa Grande? [315]

A. Yes, sir.

Q. The ASC Office at Casa Grande?

A. Yes, sir.

Q. How did this come to be dated Chandler, Arizona? Do you remember that?

A. No, I don't.

Q. But read the statement over now, and see if you can identify whether that was given in Chandler, or at the ASC Office. I never heard of that Statement before I saw it in the courtroom.

A. Well, it is my recollection they made a, I believe they made a statement at Casa Grande, and then at my home.

Q. And they condensed the statement that you

(Testimony of Rex L. Neely.)

had given them into this document here, marked Government's Exhibit 25, or do you know?

A. I don't know. I presume they did.

Q. That is not your handwriting, is it?

A. No, this is not my handwriting.

Q. Do you know who wrote it up?

A. I believe Mr. Johnson did.

Q. All right. Was that written up in your presence, or written up after you had made the statements, and then it was presented to you for signature?

A. I believe it was made up during the conversation. I mean I believe it was, but I am not positive. [316]

Q. I notice that this is purportedly signed on each page, "Rex L. Neely." Is that your signature?

A. Yes, sir.

Q. Was there any tape recording used in the making of this, that you know of?

A. Not that I know of.

Q. And later you gave rather a long-winded statement to these government agents?

A. Yes, sir, I did.

Q. Were they both present at all times?

A. Not all the time, but I believe practically.

Q. Can you tell us—I know you can't remember dates, it is pretty hard—I can't remember what I had for breakfast yesterday morning, but can you tell us about, forgetting this statement of January 22nd, or whatever date that is, can you tell us

(Testimony of Rex L. Neely.)

about the time that these other statements were made by you? A. On the recordings?

Q. They were on tape recordings?

A. Yes.

Q. Yes, I know that. Do you know when they were made, or can you remember?

A. I believe it was within ten days of this statement.

Q. Of the January one? A. Yes. [317]

Q. And you heard Mr. Johnson testify that, and probably Mr. Kennedy, that this statement here which is now in evidence as a Government's Exhibit 24, was written by the government agents, and shown to you? A. Yes, that is correct.

Q. And that you did make some corrections?

A. Yes, I did.

Q. Now, Mr. Neely, what is the extent of your education? A. I went through high school.

Q. Ever been to college?

A. No, sir.

Q. Are you familiar with all the technical terms and verbiage in this statement, Government's Exhibit 24 in evidence? A. I am afraid not.

Q. How long did you spend in reading that over before you determined whether or not you would sign it?

A. I would say probably ten——

Q. Pardon me?

A. Ten or fifteen minutes.

Q. And I notice that it is not signed.

A. No, sir.

(Testimony of Rex L. Neely.)

Q. Why didn't you sign it?

A. I wanted to get in contact with the lawyer before I made anything final. [318]

Q. And did you tell them that?

A. Yes, sir, I believe I did.

Q. I see. Who is the lawyer you were going to contact? A. Dick Johnson.

Q. That is a lawyer at Mesa?

A. At Mesa.

Q. Is he your regular lawyer?

A. Well, I wouldn't say that. I have never had a lawyer, I mean, I never had occasion to have a lawyer before.

Q. Why didn't you get Dick Johnson? Did they give you time, or what was the situation?

A. I couldn't contact him the night that this statement was handed to me. I tried to get in contact with Mr. Johnson but he was out and I couldn't reach him by phone.

Q. And the government never left a copy of that statement with you?

A. No. I asked for a copy, but——

Q. They wouldn't give it to you? A. No.

Q. Or they didn't, at least?

A. They didn't give me a copy.

Q. The only time you saw that statement after you had seen it was after I had gotten it from the prosecuting attorney?

A. Yes, sir, that is correct. [319]

The Court: We will have our morning recess at this time.

(Testimony of Rex L. Neely.)

(Recess.)

The Court: You may continue.

Q. (By Mr. Whitney): Now, Mr. Neely, I don't know whether I have asked you or not, I have forgotten. In connection with Government's Exhibit 16-C in evidence, which is the purported 1956 Upland cotton marketing card, is that your signature on that? A. Yes, sir.

Q. And that was issued, according to this signature, on October 3rd, 1956? A. Yes.

Q. And covered your 1956 Upland cotton?

A. Yes, it did.

Q. Now, tell us the circumstances under which you received that Marketing card.

A. As I recall, I went to the ASC office a number of times that year, but this particular time I got my marketing card I was talking to H. L. Mathis in there about my ACP practice, and stating that I was going to be picking cotton pretty soon, and would like to get my marketing card.

And as I recall, he instructed Mrs. Goldsten, who was in the next office, I believe, to get my file and give me a marketing card. [320]

Q. For 1956? A. Yes, sir.

Q. And that is the card you got?

A. Yes, sir.

Q. And it was given to you by Mrs. Golsten?

A. Yes, sir.

Q. Was Mr. Short in the office then?

A. I didn't see him in the office.

Q. And do you remember who signed the card,

(Testimony of Rex L. Neely.)

"H. L. Mathis", and then there is a couple of initials after it, or do you remember that?

A. No, I don't remember that. Mr. Mathis instructed Mrs. Golsten to get my file, and I don't know whose writing that is.

Q. Mrs. Golsten, did she discuss your file with you? A. No, sir, she didn't.

Q. What did she do? Examine the file and then issue the marketing card?

A. I believe so.

Q. And you just did that like the other marketing card, you put it in your pocket and went on about your business? A. Yes, sir.

Q. What did you do with the marketing card when you got them, any of them? What is the purpose of them?

A. Well, you're supposed to take it to the gin, and it [321] makes you eligible to market your cotton.

Q. And have you ever had any cards issued to you "non-eligible"?

A. No, not by Pinal County.

Q. Now, you have in Maricopa?

A. Yes. I am pretty sure that I have. I think that I have.

Q. I see. Now, then, in those you didn't get out a government loan, you didn't put your cotton in CCC loan? A. No.

Q. When you got that card, did you pay any particular attention to the 1956 allotment, 367.7 acres, and planted cotton 306.7? A. No.

(Testimony of Rex L. Neely.)

Q. Who wrote that on there?

A. I don't have any idea.

Q. Mrs. Golsten issued the card, didn't she?

A. Yes.

Q. She gave it to you? A. Yes.

Q. And the testimony is by Mr. Mathis that she signed it at his request? A. Yes.

Q. Do you know whose handwriting that is up there? Check it again. It is H. L. Mathis? [322]

A. No, I don't know for sure. It says H. L. Mathis, but I am not sure of his writing.

Q. Of the other handwriting?

A. Of the other handwriting.

Q. You had nothing to do with it?

A. No, sir, I did not.

Q. Short had nothing to do with it?

A. I didn't see him there?

Q. When was Joe Short first sick, do you remember? A. No. No, I don't.

Q. Well, he had been on and off in the office there for some period of time. You knew he worked part-time some of the time, didn't you?

A. I was told he had worked part-time. I don't know.

Q. In other words, after closing your transactions for the three years in question, 1954, 1955, and 1956 with Mr. Short, you had very little occasion to see him? A. That is correct.

Q. Now, Mr. Neely, in your statement to the government, with reference to your 1956 cotton, this is your unsigned statement, it says:

(Testimony of Rex L. Neely.)

"In my overplanting and failure to destroy the excess cotton, there were also other considerations which made me reluctant to destroy cotton. In 1956 I was over-extended on water, with the result [323] that there were burned areas in my cotton and it looked as if my crop would not be as heavy as expected on that account, thus reducing my income. I was reluctant to destroy any of it because of this. In addition, in connection with the 1955 crop, there was talk among farmers that a lot of them were not destroying their excess cotton, and there was also talk about laxity in administering the program in the ASC Office, both in 1955 and 1956."

Was that practically the statement that you made?

A. Yes.

Q. Now, in the next sentence you said:

"I guess I thought I might get by without plowing up my excess cotton in 1956."

Is that the statement as you made it?

A. I am not sure that I made that last remark there.

Q. What do you remember? What did you say, or do you remember?

A. As I recall that, being late in the season, I thought I would get a penalty notice later in the season.

Q. For the 1956 cotton? A. Yes.

Q. Now, Mr. Neely, referring to Government's Exhibit—well, we will do it one at a time—referring to Government's Exhibit 14-A, which is the check dated April 5th, 1954, that [324] is the sec-

(Testimony of Rex L. Neely.)

and check you gave Short, which you didn't stop payment on. Was that entered on your books?

A. Yes, it was.

Q. And taken off your income tax?

A. Yes, sir.

Q. As what? A. As a lease.

Q. Referring to the Exhibit 14-B in evidence, Government's Exhibit, which is a check to Joe Short for \$1410, covering the 1955 deal of 70 and 1/2 acres, where you marked on it "cotton base", or "cotton lease", did you put that on your books?

A. Yes, as a lease.

Q. How was it put on your books?

A. It was a lease of the Burns farm.

Q. You took it off your income tax?

A. Yes, sir.

Q. Everything over and above-board on it?

A. Yes, sir.

Q. Referring to Government's Exhibit 14-C in evidence, a check dated 12/9/55, payable to Short for \$1750, was that put on your books?

A. Yes, sir, it is.

Q. And how?

A. As lease of the Burns farm, I believe. [325]

Q. And taken off your income tax, deducted?

A. Yes, sir.

Q. For that year? A. Yes, sir.

Mr. Whitney, awhile ago, I believe you asked me if any of that cotton had been put on loan, CCC.

Q. Yes.

A. I believe some of it was. I believe you asked

(Testimony of Rex L. Neely.)

me and I said it was not, but Calcott, they handled my cotton. I don't know what they did, but I presume they did. They could have.

Q. You didn't tell them one way or the other?

A. No, sir.

Q. You didn't finance with Calcott?

A. No, sir.

Q. You finance yourself?

A. No, Valley Bank.

Q. Now, with reference to that Government's Exhibit 14-C dated December 9th, 1955, for 60 acres of cotton, and I believe you said that you would guess the price put on it by Short was \$25 an acre for that year.

Will you explain to the Jury how that extra \$250 got on there?

A. This is on the 1956?

Q. That is the 1956. [326]

A. But it happened in 1955, I think the check was dated.

Q. In 1955?

A. Yes, 1955, yes, sometime. I went to the office there, like on the other occasions, and asked Mr. Short about the Burns allotment lease. He indicated that it would be for 60.7 acres, but this year that it would be \$25 an acre, it would be more than it had been.

Q. And why didn't you write him out a check then for \$1500?

A. Because I thought the cotton was worth, the

(Testimony of Rex L. Neely.)

cotton acreage was worth more than I had been paying originally.

Q. And was there anything said there with reference to Short's wife?

A. I am not sure that it was said at that time. I knew that not from him, but through other employees there that he was going to have some hospital expense.

Q. For whom?

A. For his wife. But my primary reason was that the cotton base was worth more than I had been paying.

Q. Before we get down to this, Mr. Neely, I would like to ask you when you made application first for your ACP payments, I think that's what they call them, for the ditch lining in Pinal County, if you remember?

A. I remember seeing the application the other day, in November. [327]

Q. You couldn't remember when you did that?

A. No, not specific dates.

Q. Was the time prior to the time that you built or actually put in that ditch?

A. I don't remember. I don't recall.

Q. Pardon? A. I don't recall.

Q. Anyway, the application is apparently dated November, 1953, which somebody marked "cancelled" on, and we will show about that later.

You actually put the ditch in between January and March, 1954, is that right?

A. Yes, I put in some ditch at that time.

(Testimony of Rex L. Neely.)

Q. And did you inquire about your payments on it from time to time for that ditch?

A. No, sir, I didn't.

Q. When did you finally get your payment?

A. I believe it was in the latter part of 1954, I believe.

Q. Now, Mr. Neely, before we go down to some of these exhibits, I want to ask you, do you know a man, or did you ever know a man by the name of Doyle H. Dunkin, or Doyle L. Dunkin?

A. No, sir, I don't know anybody by that name.

Q. I hand you now Government's Exhibit 12-D in evidence, [328] which says "Concrete ditch lining, Section 13, 4 South, 3 East."

Do you know anything about that?

A. No, I don't. I don't know anything about this.

Q. Did you write that? A. No, sir.

Q. Do you know who did?

A. I haven't any idea.

Q. Did you have anything to do with that document? A. Not in the least.

Q. Referring to Government's Exhibit 12-E in evidence, which is Practice Tentatively Approved, June 1st, 1954, Concrete Ditch Lining, Referring to Section 13, 4 South, 3 East, that is your ground, isn't it? A. Yes.

Q. I notice that is signed by Doyle H. Dunkin, purportedly? A. Yes.

Q. Did you have anything to do with that?

A. No, sir.

(Testimony of Rex L. Neely.)

Q. Did you ever know of it before you talked to the agents? A. No, sir.

Q. And when was that, the latter part of December, 1956, I believe you talked to the agents about it?

A. The first part of 1957, January.

Q. And did you have any active part in that?

A. No, sir, I didn't.

Q. Showing you Government's Exhibit 12-G for identification, marked Supervisor's Field Sheet—25, with a lot of figures, and some drawings on that, did you ever see that?

A. No, I have never seen that sheet.

Q. Either front or back? A. No, sir.

Q. Do you know anything about it at all?

A. No, sir.

Q. You didn't have anything to do with it?

A. No, sir, I didn't.

Q. Referring to Government's Exhibit 12-C, for a land leveling of 350 dollars, that is not involved here, did you know anything about that? That is Approved Practice, and application for payment. Did you ever get \$350?

A. Well, I don't know that I did.

Q. That was switched, wasn't it, to ditch lining sometime prior to that time? A. Yes.

Q. Did you know that \$1500 was the limit that any one farmer could get? A. No, I didn't.

Q. Who did you rely on for such information?

A. The office, the ASC Office.

(Testimony of Rex L. Neely.)

Q. Now, I show you Government's Exhibit 12-A in evidence. [330] Is that your signature?

A. Yes.

Q. Dated May 24, 1954? A. Yes.

Q. Approved by R. B. Elsberry? A. Yes.

Q. On 5/27/54. Did you know anything about that other than signing that? A. No.

Q. I notice there is "Request for Change of Approval from 1st to Second Practice, 5/27/54."

Do you know whose handwriting all that is?

A. No, I don't know anything about the handwriting.

Q. You've got the Land Leveling scratched out, and the Ditch Lining \$1500? A. Yes.

Q. Was that made out at the time you signed it, or do you know?

A. I don't know whether it was or not. I couldn't swear to it.

Q. You signed that just like you did most any of the documents that they handed you?

A. Yes.

Q. Now, referring to Government's Exhibit 12-B, dated May 25, 1954, Rex L. Neely, 1954 ACP, Land Leveling, June, [331] \$1500, and that was cancelled out, wasn't it? A. I think so.

Q. You never got the money for that?

A. No.

Q. That is dated July 23rd, 1954, and signed Ray W. Bates. Do you know who he is?

A. Yes, I know Mr. Bates.

Q. Who is he?

(Testimony of Rex L. Neely.)

A. I believe he is head of the ACP.

Q. Referring to Defendant's Exhibit G for identification, which is Request that Federal Government Share Costs of Needed Conservation Practices, 1954, Agricultural Conservation Program.

Your farm number is 647?

A. Yes.

Q. And that is stamped in there, 86-011 647?

A. Yes, sir.

Q. Pinal County. A. Yes, sir.

Q. Rex L. Neely, owner, 699 North Washington, Chandler. That is your land described in there?

A. Yes.

Q. A farm? A. Yes.

Q. Is that your signature on there, Mr. Neely?

A. Yes, sir.

Q. It is. And that is dated——

A. November 2nd, 1953.

Q. And that was for the concrete ditch lining, \$1500? A. Yes.

Mr. Whitney: I now offer this in evidence.

Mr. Holohan: We have no objection.

Mr. Whitney: I beg your pardon?

Mr. Holohan: No objection.

The Court: It may be received.

The Clerk: Defendant's Exhibit G in evidence.

(Said Request to Share Costs was received in evidence and marked as Defendant's Exhibit G.)

Q. (By Mr. Whitney): Mr. Neely, calling your attention to Government's Exhibit 12-F in evidence,

(Testimony of Rex L. Neely.)

which is Approved Practices and Application for Payment, apparently on your farm. Is that your signature there? A. It is.

Q. And did you sign it on or about that date, or did you write that?

A. I didn't write that. I don't know at what time I did sign it. It says there September 27.

Q. Now, when you signed that, would you tell me whether the words "No" were written in on both places in the last paragraph, in red printing, if you remember? [333] A. No, they weren't.

Q. Who gave you that to sign?

A. I believe Mr. Short.

Q. And do you know anything about this "P. B. H., 9/25/54", or anything like that?

A. No, sir, I do not.

Q. Do you remember whether this red ink was up there or not, or do you remember it?

A. I don't remember it being there.

Q. And that is the only ditch lining that you collected for in Pinal County, was that \$1500?

A. Correct.

Q. And you got your payment for that sometime after you signed that document, Government's Exhibit 12-F? A. I believe so.

Q. And that was for the work that was done in connection with that application, Defendant's Exhibit G, which is the application made in November, 1953? A. I presume so.

Q. You never received any payment between No-

(Testimony of Rex L. Neely.)

vember, 1953, and September, 1954, from Pinal County practices, except that \$1500?

A. I am not sure.

Q. Well, not for ditch lining. I mean for ditch lining for 1954 practices? [334]

A. That's right.

Q. And this Defendant's Exhibit G in evidence, which was made in November, 1953, which Mr. Johnson said was proper, if it was proper as far as time is concerned, it was for the 1954 Agricultural Conservation Program?

A. Yes.

Q. Referring to Defendant's Exhibit H for identification, which is a document entitled Practices Tentatively Approved Which Require Determination of Need and Practicability, referring to this farm 647, 1954 ACP, which means "practices"?

A. Yes.

Q. Do you know that date of November 5, 1953?

A. Yes.

Q. Would you examine that document and tell me where you received that, if you remember.

First, did you ever receive it?

A. I believe so. I believe it came in the mail.

Q. Well, you gave it to me, didn't you?

A. Yes.

Q. All right, how did you receive it?

A. I believe it came through the mail.

Q. That is a concrete ditch lining, November, 1953, it was intended to start, and the cost was \$1500?

A. Correct.

(Testimony of Rex L. Neely.)

Mr. Whitney: I offer "H" in evidence. [335]

Mr. Holohan: No objection.

The Court: It may be received.

(Said Form ACP-247 was received in evidence and marked as Defendant's Exhibit H.)

Q. (By Mr. Whitney): Now, Mr. Neely, referring to Defendant's Exhibit F for identification, which is a letter supposedly from Rodney Elsberry, Chairman of the Pinal County ASC Committee, dated October 11, 1957.

Where did you receive that?

A. I received it through the mail.

Q. And attached to that letter are certain documents asking for your cotton history?

A. Yes, sir.

Q. Did they come with that letter?

A. Yes, sir, they did.

Q. Do you know of your own knowledge what those were for, or are we going to have to rely on what Mr. Johnson told us?

Mr. Holohan: I object to going into this line of questioning on this particular document. It is dated after the time of the indictment, and can have nothing to do with this case. It is immaterial.

Mr. Whitney: If the Court please, as late as October, October 11, 1957, they were trying to get the history of this thing, and it was after his indictment, and I wouldn't [336] let him give it.

Mr. Holohan: We think it is immaterial.

Mr. Whitney: And it has to do with determining the penalty for his 1956 overplant.

(Testimony of Rex L. Neely.)

Mr. Holohan: We think it is immaterial.

Mr. Whitney: We don't. I offer this in evidence.

The Court: All right, it may be received. Go ahead.

Mr. Holohan: We object to its admission.

The Court: All right, I have ruled on it.

The Clerk: Defendant's Exhibit F in evidence.

(Said Letter and Forms were received in evidence and marked as Defendant's Exhibit F.)

Q. (By Mr. Whitney): Now, Mr. Neely, getting back to the transaction you had with Mr. Short on April 5th, 1954, and the prior conversation you had with him when you gave him a check on March 20th, 1954, for \$1,620; and he gave you this lease, this so-called alleged lease from W. R. Burns. Do you remember that? A. Yes, sir.

Q. At that time did he give you any other document to sign?

A. He gave me a sub-lease, I believe it said.

Q. Never mind what it said. Did he give you one? A. Yes, sir. [337]

Q. And at the same time as the original?

A. Yes, as the original.

Q. And it was already made out, is that right?

A. Yes, sir.

Q. I hand you Defendant's Exhibit I for identification. Is that the sub-lease that he gave you to sign? A. Yes, it is.

Q. Did you sign the original? A. Yes, sir.

(Testimony of Rex L. Neely.)

Q. What did you do with the original?

A. I took it home with me.

Q. I know, but did Mr. Short get a copy, or wasn't this your copy, or do you remember?

A. I don't remember.

Q. But you signed one of them anyway?

A. Yes.

Q. Did you sign the sub-lease, too, or do you remember?

A. I signed the one. I remember signing the one.

Q. And you gave me that? A. Yes, sir.

Q. Why didn't you call that to the attention of Mr. Short and Mr. Kennedy at the time that they were examining you about this matter?

A. It had slipped my mind. I didn't think of it, was the only reason. [338]

Mr. Whitney: I offer this for whatever it may be worth.

Mr. Hays: We don't care.

The Court: It may be received.

The Clerk: Defendant's Exhibit I in evidence.

(Said Sub-lease was received in evidence and marked as Defendant's Exhibit I.)

Q. (By Mr. Whitney): Now, Mr. Neely, with reference to Counts I, III, and V of the indictment, you were charged with giving Mr. Short \$1620 in Count I, which covered 1954; \$1410, covering the crop year 1955; and \$1750 covering the crop year 1956.

And this indictment charges you with giving that

(Testimony of Rex L. Neely.)

as a bribe to Mr. Short to secure that extra cotton allotment.

I want you to tell this Jury whether or not you gave that to Mr. Short as a bribe, or ever intended it for that?

A. No, I didn't. I never intended it to be a bribe. I didn't have any idea that it would be interpreted that way.

I didn't have any knowledge that it was a false deal.

Q. You even went to the trouble in 1954 of stopping one of your checks? A. Yes, sir.

Q. And making inquiry around, including from your banker, [339] to determine whether or not you should have a lease? A. Yes, sir.

Mr. Holohan: We are going to object to this. It is getting too leading.

The Court: Yes, it is a little leading.

Q. (By Mr. Whitney): Now, of course, you didn't know anything about the workings of the mind of Mr. Short at the time those checks were given in either of those years? A. No, sir.

Q. Now, Mr. Neely, in Counts VI, VII, VIII, IX, X, and XI, you were charged with unlawfully aiding and abetting and inducing Defendant Short to make certain entries in the books and records of the Pinal County Agricultural Stabilization Committee.

Did you have anything to do with making any of those entries? A. I most certainly didn't.

(Testimony of Rex L. Neely.)

Q. Did you ever discuss any of those entries with Short? A. No, sir, I didn't.

Q. Did you ever know that any of those entries, as far as you are concerned, were false?

A. No, sir, I didn't.

Q. Pardon me? A. I didn't, no.

Q. Now, then, Mr. Neely, did you ever have any agreement, [340] direct or implied, with Mr. Short, in which you and Mr. Short conspired in any manner to defraud the United States Government?

A. None whatsoever.

Q. Of course, you don't know anything about the workings of Mr. Short's mind?

A. No, I sure don't.

Q. But as far as you were concerned, you had no understanding? A. No, sir.

Q. Direct or implied?

A. No, sir, I did not.

Q. Did you know of anything at that time, as to whether Mr. Short was doing anything wrong?

A. No, I didn't.

Q. And only discovered it, as you stated, the latter part of December, 1956?

A. That's when I discovered it.

Q. Now, in all of these dealings that you had with Short, every one of them, all during these three years in question, did you rely on what Mr. Short did and told you? A. I did.

Q. Did you have any reason to believe that he was not telling you the truth?

A. None whatsoever. To my knowing. [341]

(Testimony of Rex L. Neely.)

Q. Now, Mr. Neely, in connection with the conspiracy indictment that you said you had nothing to do with.

Did you know that on or about the 19th of March, 1954, as charged in this indictment, that Short altered the amount of your 1954 acreage allotment on the official listing sheet of Pinal County Agricultural Stabilization and Conservation Committee, by lining out the figures 319.8, and inserting above it the figures 400.8? Did you know that?

A. I had no knowledge.

Q. Did you ever see the listing sheets?

A. I don't believe I ever did. I'm sure I didn't.

Q. Pardon? A. I never did.

Q. Did you ever see any of the records in that office? A. Never.

Q. Outside of what they handed you to sign?

A. That's correct.

Q. Now, it is charged that on or about March 30, 1954, Short signed the fictitious name W. R. Burns to a lease, by which 160 acres of land having the same legal description as Farm 595, you of course testified that you never knew that that was a fictitious name until December, 1956, is that correct?

A. That's correct.

Q. All right. Do you know anything about Farm 595? [342] A. No, sir.

Q. Did you ever hear of it before?

A. No, sir, I didn't.

Q. Did Short ever discuss it with you?

A. No, sir.

(Testimony of Rex L. Neely.)

Q. Then, of course, you testified you never examined any of the documents I am talking about, the records in the office of the Stabilization Committee down in Casa Grande?

A. That's correct, I never have.

Q. Now, it charges that one of the overt acts was on April 5, 1954, that you issued a check payable to Short for \$1620. You did that, didn't you?

A. Yes, sir.

Q. And you have explained how. On November 22nd, 1954, you issued a check payable to Short for \$1410. You did that, didn't you? A. Yes, sir.

Q. Under the circumstances you described?

A. Yes, sir, for the Burns lease.

Q. That on or about the 18th of August, 1955, you signed Form 578, an official form of the office, showing 426.5 acres of planted short staple cotton, none destroyed.

Do you remember you already testified as to that?

A. Yes.

Q. And that you have already testified that your allotment [343] shown on the card and finally determined was 306.1 acres? A. Yes.

Q. And that, together with the amount that you got of 70 and one-half acres from Short on the so-called Burns lease, that you destroyed enough cotton, you thought, to bring you within compliance?

A. Yes, sir.

Q. And Mr. Short never gave you any notice?

A. That's correct.

Q. But he did tell you you were overplanted?

(Testimony of Rex L. Neely.)

A. Yes.

Q. Now, on December 9, 1955, it is charged that you issued a check to Short for \$1,750. You did that, didn't you?

A. Yes, sir.

Q. Under the circumstances you have described?

A. Yes, sir.

Q. Now, that on October 3rd, 1956, you signed Form 578, an official form of the office, for short staple cotton, showing planted acreage of 477.7 acres, and you stated you believed when you signed that, either those figures weren't on there, or you didn't see them, you didn't examine them?

A. I don't recall seeing the figures there.

Q. And you accepted a short staple marketing card at that time showing planted acreage of 306.7?

A. Correct. [344]

Q. But that you didn't notice that particular one?

A. Yes, sir.

Q. And that is the cotton that you were intending to pay a penalty on if they had sent you the notice?

A. That's correct.

Q. The next charge is on or about December 1st, 1956, Short instructed Mathis to make up a new notice of allotment showing Neely had an allotment of 367.7 acres.

Did you know anything about that, his instructions to Mathis?

A. Nothing whatsoever.

Q. Did you ever discuss it with him?

A. No, sir.

(Testimony of Rex L. Neely.)

Q. When is the first time you learned about it?

A. I believe when this case, when this case came up.

Q. When this thing broke? A. Yes.

Q. In December, 1956? A. Yes.

Q. Then it is charged that on or about August or September, 1954, you requested the Agricultural Conservation Program for assistance for ditch lining practice, indicating the construction of the ditch would be commenced by you in September.

That has been explained by you, by the application in 1954, which somebody marked Cancelled.

A. The application was made in 1953, the fall of 1953.

Q. You did finally receive the \$1500 for that?

A. Yes.

Q. After sometime in September, 1954?

A. Yes.

Q. For the work that you had done between January and March, 1954? A. Yes, sir.

Q. The next is that in September, 1954, Neely made application for payment in the amount of \$1500. That you did? A. Yes.

Mr. Whitney: If the Court please, may we have the recess now?

The Court: All right, the Court will stand at recess until two o'clock.

(The noon recess was taken.) [346]

Tuesday, September 16, 1958, Two o'clock p.m.

The Court: You may continue.

REX L. NEELY

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Whitney): Mr. Neely, handing you Government's Exhibit 23 in evidence, a check of the Treasurer of the United States for \$1500, dated October 6, 1954, and apparently for the 1954 AC program. Do you remember receiving that check?

A. Yes, sir, I do.

Q. And Exhibit Number 21, the deposit of that check on October 7th, 1954. Do you remember that?

A. Yes, sir, I do. [347]

Q. And that was for the 1954 practices?

A. Yes, sir.

Q. Do you remember receiving a check also in 1954, prior to this date?

A. Yes, sir, I do.

Q. For \$1500? Wait a minute, yes, for \$1500?

A. Yes, sir.

Q. And when was that, do you remember? If you remember?

A. It would be the first part of 1954.

Q. And what was that for?

A. It could have been the 1953 practice.

Q. Practice? A. ACP practice.

Mr. Whitney: I am finished with Mr. Neely. You may have him for cross examination. But may I, if the Court please, with permission of the United

(Testimony of Rex L. Neely.)

States Attorney, I have one more character witness, if he is here, that would like to get away.

May I withdraw Mr. Neely and put him on?

Mr. Hays: It is perfectly all right.

The Court: You may.

Mr. Whitney: Mr. Stapley. [348]

L. E. STAPLEY

called as a witness in behalf of the Defendant Neely, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Whitney): Will you state your name, please. A. L. E. Stapley.

Q. Where do you reside, Mr. Stapley?

A. I reside at—you want the home address, or just Phoenix, Arizona?

Q. That is all right. How long have you resided in this county?

A. In the county since 1901.

Q. That is about the time you were born, I guess? A. That's right.

Q. Are you acquainted with Mr. Rex L. Neely, the Defendant here? A. Yes, sir, I am.

Q. How long have you known him?

A. Well, I couldn't put the exact date, because I did business with his father, and when he went to school I know he helped summertimes, and then business dealings were started when he got married, approximately 13 years ago.

Q. Do you know his reputation in the com-

(Testimony of L. E. Stapley.)

munity in which [349] he resides for honesty and integrity?

A. We have always found, and I have always found him as good as his word, yes, sir.

Q. Do you know his reputation in the community in which he resides for truth and veracity?

A. I have heard nothing contrary.

Mr. Whitney: You may have the witness.

Mr. Hays: No questions.

Mr. Whitney: Thank you, Mr. Stapley.

(Witness excused.)

Mr. Whitney: Would you resume the stand, Mr. Neely.

REX L. NEELY

resumed the stand.

Mr. Whitney: You may cross examine.

Cross Examination

Q. (By Mr. Holohan): Now, Mr. Neely, I will show you what has been marked Government's Exhibit 12-G. When your counsel showed you that document, I believe you said you hadn't seen it before.

A. To the best of my recollection, I do not remember.

Q. Do you remember sitting with Mr. Johnson, and going over that matter on 12-G at some length?

A. (No answer.) [350]

Q. I will strike the question now, and you be

(Testimony of Rex L. Neely.)

thinking about that, and as we go along I will ask you about it again.

Now, with regard to your statement, which is Government's Exhibit 24, Mr. Neely, how long did you go over that statement? How long a period of time was it that you went over it?

A. Before initialing the changes, is that what you mean?

Q. Let's say from start to finish, from the time that Mr. Johnson and yourself met, and the statement was prepared, or was presented, rather, to you, including the markings, the changes, and the initialing, and all, what period of time was occupied?

A. There was several meetings with Mr. Johnson and Mr. Kennedy.

Q. With regard specifically to this statement, didn't the agent bring you the statement already prepared the agent being Mr. Johnson?

A. Yes, sir.

Q. Didn't he bring it to your house?

A. Yes, sir.

Q. Didn't you ask him to have the conversation with you in his automobile?

A. I was in his car, I believe.

Q. All right, at that time, then, on that occasion, how much time was consumed by you and him in going over that statement? [351] As a matter of fact, to refresh your recollection, it was about an hour and a half, wasn't it?

A. I didn't particularly notice the time.

(Testimony of Rex L. Neely.)

Q. It could have been?

A. It could have been, yes.

Q. On the several pages making up this Government's Exhibit 24, there are portions of it where we find lined out sections?

A. Yes, sir.

Q. Those were items that you did not agree to, and the agent lined out, and you initialed it?

A. Yes, sir.

Q. We find that on many of the pages here, don't we?

A. Yes.

Q. In other words, you have gone over this statement just prior to trial with your attorney, haven't you?

A. Yes, sir.

Q. All right. Now, if we may, on the ACP. Page 8, on the ACP. That would be Page 8 of Government's Exhibit 24. In that statement, they said:

"I have been shown——"

Supposedly you speaking here.

"I have been shown ACP forms on which——"

Excuse me. I will start again.

"I have been shown the forms in an ACP folder [352] in the ASC Office in connection with a 1954 ditch lining practice on my Pinal County farm. According to these documents I requested assistance on a land-leveling practice on May 24, 1954 and on May 27, 1954, I requested approval of change to ditch lining."

That was the way the document showed, wasn't it?

A. (No answer.)

Q. And to refresh your recollection there, I will

(Testimony of Rex L. Neely.)

show you 12-A, which was your application. That's what the document shows, isn't it?

This specific item here, it is dated—we are talking about 12-A now, the document appears to have been signed by you on May 24, 1954, does it not?

A. Yes.

Q. Or, at least, that is the date underneath your signature. Over in the corner under the Remarks section, it bears this, "Request for Change of Approval from First to Second Practice, 5/27/54."

A. Yes. That's right.

Q. Now, you are familiar with the document now?

A. Well, I see it here. I mean, I am not——

Q. This is about the fifth time that the matter has been gone over with you, isn't it?

A. Not this form, no. [353]

Q. What is this, only the third time? Once by Mr. Johnson, once by your counsel, and once now by me? A. Yes.

Q. All right. Now, your land leveling was actually a matter that you had pursued until sometime in June or July of 1954, wasn't it?

A. No, sir. My land leveling was near completion, as best I can remember, in February, the latter part of the February, the first part of March.

Q. Now, Mr. Neely, how could you be applying for land leveling then in May, when you had completed it in February or March?

A. I have no recollection of these dates on here. I don't know how they——

(Testimony of Rex L. Neely.)

Q. They came about? A. No, sir.

Q. Do you remember having any contact with people from the Bureau of Soil Conservation in 1954, in the summer at, which time your land was inspected first for need, then was inspected for the practice, you continued to level the land, but it didn't come up to their specifications, and they refused to approve it for payment?

A. Yes, sir.

Q. You recall that, don't you?

A. I remember portions of it, yes. [354]

Q. So that puts it in 1954, and it is actually into July.

I show you 12-B. The first time that they went out for an inspection of the particular practice that you were following, according to the application for land leveling certified as to its need in 1954, in July.

A. Yes, sir.

Q. Thereafter, however, they never certified to the payment, because you hadn't done it quite to their strict specifications? You recall that, don't you? A. Yes, sir.

Q. All right. All this time, then, supposedly you were heading for land leveling. When did you change to ditch lining?

A. It was suggested that I change to ditch lining.

Q. By whom? A. I believe Mr. Short.

Q. All right. Then you take it that he did the necessary entries to accomplish that?

A. I have no knowledge of what he did.

(Testimony of Rex L. Neely.)

Q. You have no knowledge of what he did?

A. Of what he did, correct.

Q. But this would have been sometime, then, in July of 1954, since you couldn't be paid for your land leveling, the suggestion came from Joe Short that you change to ditch lining? Is that your testimony? [355]

A. I don't understand.

Mr. Holohan: Read it.

(The last question was read.)

A. (By the Witness): I believe that it would be sooner than that, because as I recall it, we had the crop practically ready for cotton that year, and I believe it would be in the latter part of April, or the first part of May.

Q. (By Mr. Holohan): Are you sure you are talking about the same land leveling that I am? What land did you level in 1954?

A. What we call Number 4 there.

Q. That was leveled in 1954? A. Yes, sir.

Q. Did you plant cotton in that field?

A. Yes, sir.

Q. That is all the land leveling you did in Pinal in 1954?

A. I believe that is correct.

Q. All right. You say this was done when?

A. We started the land leveling I believe in February.

Q. I see.

A. I believe the contractor pulled in the field and started in February.

(Testimony of Rex L. Neely.)

Q. When did you first learn that this practice, that your land leevling had been not approved for payment by the Soil people? [356]

A. I couldn't give you a specific date.

Q. Was it after the cotton was already planted?

A. I couldn't answer that and be sure.

Q. As far as you are concerned, the document over there is correct, that you changed from land leveling to ditch lining in May 27?

A. That could possibly be, yes, sir.

Q. All right, that is your position?

A. Yes, sir.

Q. As of now, anyway?

A. As I recall, that was changed from land leveling to ditch lining.

Q. This ditch was already in, wasn't it?

A. I believe it was.

Q. At a time prior to the change, even?

A. I believe so.

Q. Now, let us forget about this ditch for a minute. You acquired this land in what year?

A. In the spring of 1953.

Q. In the spring of 1953?

A. I believe it was February, the latter part of January, the first part of February.

Q. In 1953? A. Yes, sir.

Q. You had entered into negotiations, or had an option prior to that time, didn't you? [357]

A. Option, no, sir.

Q. Had you entered into negotiations prior to that time, prior to January, 1953? A. No, sir.

(Testimony of Rex L. Neely.)

Q. All right, now, you put in a mile and a half of ditch on that land the first thing?

A. In 1953.

Q. Yes, 1953, and the latter part of 1953 and the early part of 1954? A. Yes, sir.

Q. That was a mile and a half of ditch that was lined anyway, ditch lining, is that correct?

A. The latter part of 1953 and the first part of 1954.

Q. All right. Now, it generally follows this same line as we have shown on the board, of D to F, and of C to B? A. Yes, sir.

Q. All right. We cut it off there. (Indicating on blackboard.) You were paid for that practice in April some \$1500, weren't you?

A. I believe that is correct.

Q. In other words, you got \$1500 for this practice here? A. Yes.

Q. There was actually some little foul-up in your having put in two applications for this same thing, wasn't there? [358]

A. As I remember the application for this part here was made in November of 1953.

Q. In November of 1953? A. Yes.

Q. And that these cancelled things that you have reference to, your counsel has shown you?

A. I believe that is correct.

Q. Eventually, however, you did get paid in April? A. Yes.

Q. About April of 1954 for this practice?

A. I think that is correct.

(Testimony of Rex L. Neely.)

Q. All right. Thereafter, this ditch was also placed in "A" to "B", this one right here?

A. Yes.

Q. "A" to "B"? A. Yes, sir.

Q. And that is what you applied for in this May date? A. I presume so.

Q. This ditch was in prior to the time you applied for it? In other words, by May 27th, the ditch had already been in?

A. I don't recall the date.

Q. You have stated that you don't know anything about Doyle Dunkin? A. No, sir.

Q. You don't know him? [359]

A. I do not.

Q. And your land is not in the Indian Reservation? A. No, sir, it is not.

Q. Did you ever have a talk with the Soil Conservation people in 1954 about your land leveling?

A. On this field here?

Q. Yes, Number 4.

A. I believe I talked to Ray Bates, who was the head of the——

Q. Of the office at that time?

A. Yes, sir.

Q. Was he the one that told you that your practice had been disapproved?

A. I believe, well, I don't know. I don't know whether it was he, or it was an engineer that—or a field man.

Q. They found fault with some of the land level-

(Testimony of Rex L. Neely.)

ing there? Anyway, it didn't come just exactly the way you wanted it done.

A. As I recall, time being the element at that time of year, to getting my crop in, the contractor finished his part of it on Friday, sometime Friday morning, I believe, or something.

Q. What month?

A. I believe it was in April.

Q. All right.

A. And I notified the office that we were ready for—— [360]

Q. Inspection?

A. Inspection, as I recall, and they said, well, we can't get out and check it until the following Monday.

Q. All right.

A. And I believe that I wanted to get the crop in, that, like I say, time being the element, with their suggestion that I switch from land leveling to ditch lining.

Q. Now it is their suggestion now, or is it Joe Short's?

A. Well, I believe they implied that it could be done that way.

Q. All right. Now, the Soil Conservation people said you could do it that way, the one you were talking to was Ray Bates, wasn't it?

A. Yes.

Q. Do I understand you that Ray Bates told you then to apply for lining for a ditch that was already in?

(Testimony of Rex L. Neely.)

A. No, sir, that is not correct. He didn't.

Q. All right. Then you were planting your cotton in April of 1954?

A. Yes, sir. In fact, in the first part of May.

Q. First part of May? A. Yes, sir.

Q. And it was sometime in that period, then, that you were told that your practice had been changed—strike that. Sometime in there that you were told that your practice had [361] been turned down, that it wasn't approved? A. Yes, sir.

Q. I hand you your application again. Your application shows the date of May 24th, 1954, in which you are applying for land leveling.

A. I have no knowledge—

Q. And by the 24th, you knew that you would be turned down, is that what I am to understand, but yet you went ahead and applied anyway?

A. I have no knowledge of these dates on here.

Q. When did you sign the form?

A. I do not know.

Q. When did you apply for this?

A. I can't recall.

Q. In other words, we are talking about \$1500, is what you were applying for. When did you apply for that?

A. I would think it would be in the first part of the year.

Q. All right. The early part of 1954 you received \$1500, and in October you received another \$1500, and in addition to that you received, what

(Testimony of Rex L. Neely.)

was it, 700 or 800 from Maricopa County in the same year?

Mr. Whitney: For what. I didn't hear that last question.

(The last question was read.)

Mr. Whitney: I object to that as immaterial, [362] on the grounds it is not charged in the indictment.

The Court: He may answer.

Mr. Holohan: You may answer.

A. (By the Witness): I believe that is correct.

Q. (By Mr. Holohan): How much was it from Maricopa? A. I believe it was \$750.

Q. \$750. You say you did not know that the maximum that you could receive in any one year was \$1500? A. At that time.

Q. Of course, this \$1500 applied to what we call a 1953 practice, so this is considered legitimate, isn't it? Your first 1500 in April? A. Yes, sir.

Q. This Mike Watson you spoke of earlier in your testimony is now deceased, isn't he?

A. Yes, sir.

Q. You, of course, never met the fictitious Mr. Burns, did you? A. No, sir, I didn't.

Q. Never had any conversations with him, never knew who he was? A. No, sir, I did not.

Q. At all times, according to your testimony, you discussed the terms of the cotton allotment and the lease with Mr. Short? A. Yes, sir. [363]

Q. At all times, Mr. Short represented himself as the agent for the Burns people?

(Testimony of Rex L. Neely.)

A. Yes, sir, that is correct.

Q. So far as you were concerned, you were dealing with Joe Short, agent for W. R. Burns?

A. I suppose that's the way you would put it.

Q. Now, except for the 1954 year, you never received a written lease, did you?

A. That is correct.

Q. And except for 1954, you never received a revised allotment notice showing your additional cotton allotment, did you?

A. I believe that is correct.

Q. The closest that we come in 1955 is to 18-A, where something is written in ink under the typed portion there, purporting to show 70.6?

A. Yes, sir.

Q. Who wrote that in there?

A. I have no knowledge who wrote that in that.

Q. When you got it through the mail, I take it that it was there?

A. No, I don't recall. I don't remember.

Q. You don't remember?

A. If it was there or not.

Q. Have you ever taken a look at the office copy? [364]

A. I have since this trial.

Q. You have seen the office copy, haven't you?

A. Yes, sir.

Mr. Whitney: Since the trial.

Mr. Holohan: Do you want to let him answer, Mr. Whitney.

(Testimony of Rex L. Neely.)

May this be marked as an exhibit for identification in the 11 sequence.

The Clerk: Government's Exhibit 11-G for identification.

(Said Document was marked for identification as Government's Exhibit 11-G.)

Q. (By Mr. Holohan): All right, I will hand you 11-G for identification. That is the office copy that shows the 1955 allotment notice, doesn't it?

A. Yes. This would be November 12, 1954. This would be for the 1955.

Q. For the 1955 crop year? A. Yes, sir.

Q. Well, that corresponds with your notice which is 18-A, isn't it? They are issued the same day? A. Yes. Yes.

Q. They are both signed by Elsberry?

A. Yes, sir.

Q. On 11-G, do you find any inked 70.6 under the notice? [365] A. No, sir, I do not. .

Mr. Holohan: At this time the Government offers in evidence Government's Exhibit 11-G for identification as 11-G.

Mr. Whitney: No objection.

Mr. Stanfield: No objection.

Mr. Holohan: There being no objection, may the document be received?

The Court: Yes.

The Clerk: Government's Exhibit 11-G in evidence.

(Said Notice was received in evidence as Government's Exhibit 11-G.)

(Testimony of Rex L. Neely.)

Mr. Holohan: May 18-A and 11-G be shown to the Jury, your Honor?

The Court: Yes.

(The documents were passed to the Jury.)

Q. (By Mr. Holohan): Now, Mr. Whitney has gone over the Marketing Cards with you. The rule is, before you can market your cotton, the gin requires you to produce a marketing card, doesn't it?

A. Or a number.

Q. Or a number, a card number? A. Yes.

Q. In 1955, in addition to your operations in Pinal County, you also ran an operation in Maricopa, didn't, you? [366] A. Yes, sir.

Q. Your counsel has made reference to it here in introducing documents pertaining to overplant penalty? A. Yes, sir.

Q. How much were you overplanted there?

A. I believe it was 9.8 acres.

Q. What was your total allotment in Maricopa?

A. 70.

Q. 70 point something?

A. Roughly 70 acres.

Q. All right. That was made up of your own land and leased land, wasn't it? A. Yes, sir.

Q. Your leased land in Maricopa County in 1955, plus land that you owned? A. Yes, sir.

Q. You formed a combination, what is known as a combination——

Mr. Whitney: If the Court pleases, I think that is immaterial, in Maricopa County.

(Testimony of Rex L. Neely.)

The Court: Why did you go into it then. Go ahead.

Q. (By Mr. Holohan): You formed a combination in 1955 in Maricopa County, didn't you?

A. Yes, sir.

Q. A combination in essence means that the farm units are [367] formed into one farm, so far as the Agricultural Department's records are concerned?

A. I presume that is their regulations.

Q. You were refused a marketing card in Maricopa County until you paid your penalties?

A. I paid a penalty in Maricopa County, yes, sir.

Q. Let me repeat my question to you.

You were refused a marketing card until you paid your penalties, weren't you?

A. That is correct.

Q. And then your counsel made reference to something about nevertheless some of your cotton was Maricopa County cotton, was ginned under your Pinal County, that Calcott, I believe you used the term?

A. Will you state that question again, please?

Q. Some of your Maricopa cotton during this period when you didn't have the Maricopa Marketing Card, nevertheless it was still ginned under the Pinal Marketing Card, wasn't it?

A. It was ginned at the same time, yes, sir.

Q. You were sent a notice sometime in September of your overplant condition?

A. Yes, sir.

(Testimony of Rex L. Neely.)

Q. In Maricopa. Excuse me. A. Yes, sir.

Q. And you paid the penalty, as we see by your check, in February of the following year? [368]

A. Yes, sir.

Q. Your overplant was approximately nine acres, you say? A. 9.8, I believe.

Q. Now, in the same year in Pinal County, how much were you overplanted?

A. I was never notified. I presume 15 to 20 acres. I thought I was 15 to 20 acres over.

Q. Now, you have seen the 578, the form which shows that you are substantially over that figure. It is more like 50 acres overplanted?

A. I have seen it since this trial has begun.

Q. Yes. Well, there was some discussion between you and the agents on the point too, wasn't there?

A. That is correct.

Q. Your recollection, or your opinion at the time was that you were not that much overplanted?

A. To my knowledge, I didn't think I was that much over, no.

Q. All right. How much did Mr. Short tell you you were overplanted, based on the 578?

A. He didn't give me a figure at that time.

Q. All right, on August 18th, 1955, you were into the office and as I believe you told your counsel that it would be your best recollection that the date was around August 18, 1955, the same as stated on the forms 578, which are 11-B and C? [369]

A. Yes, sir.

Q. About the 18th?

(Testimony of Rex L. Neely.)

A. I presume it was around there.

Q. All right, that year, in 1955, you were farming both long staple and short staple there in Pinal?

A. Yes.

Q. All right. Now, you were overplanted on both of them?

A. Those records indicate that.

Q. All right. You tell us you knew you were overplanted on the short staple, didn't you?

A. Yes.

Q. Because you figured you planted about 388?

A. Right.

Q. Now, how much did you think you were overplanted on long staple?

A. Well, I didn't know. I did not know how much exact acreage I was over.

Q. Well, you had a very small allotment that year, didn't you? A. Yes, sir.

Q. A matter of what, three and a fraction acres of cotton allotment for long staple?

A. Yes, sir.

Q. Now, when you would go to plant that acreage, how would [370] you figure out how much to put in there? You've got to buy seed to put in the ground, don't you? A. Oh, yes.

Q. And you have to map out a part of the ground to be planted? A. Yes, sir.

Q. How much did you think you had planted then?

A. I thought I planted around—well, I don't know.

(Testimony of Rex L. Neely.)

Q. All right. Do you find any fault with the measurement of 5.6 acres? A. No.

Q. That could well be, couldn't it?

A. It could well be.

Q. Now, did Mr. Short tell you you were overplanted on long staple?

A. I am not sure that he did. I am not positive that he did.

Q. Did you ask about your measurements?

A. No, sir, I did not.

Q. He just volunteered the information on short staple, is that what I am to understand?

A. Who volunteered?

Q. Mr. Short.

A. That I was overplanted?

Q. Yes. [371]

A. I presume I took it that way.

Q. You actually, in other words, paid for a so-called remeasurement of destroyed acreage about that same date, didn't you?

A. Yes, ten dollars in the office there.

Q. So you knew that the office was concerned, or Short was concerned that you were overplanted on Short Staple? A. I presume.

Q. But you don't remember any conversation whatsoever on the amount of your plant on long staple?

A. He could have told me that I was over on long.

Q. All right. He could have told you?

A. Yes.

(Testimony of Rex L. Neely.)

Q. Thereafter you did nothing about your long staple? A. Thereafter I did nothing?

Q. Yes.

A. I disked the ends off of all the fields, including the Pima. I disked the ends off the fields.

Q. How much of your long staple did you destroy? A. (No answer.)

Q. How much did you intend to destroy?

A. I didn't know exactly how much I was over, so I didn't know how much to destroy.

Q. Do I understand you correctly, Pima is a type of cotton that brings an even higher price than short staple, doesn't it, per pound? [372]

A. Right, yes, sir.

Q. A difference in support price of about double, isn't it? A. I don't know.

Q. Well, for 1955, the one you got somewhere around 33 cents a pound, and the other was up around 60 cents, isn't that correct?

A. I believe that is correct.

Q. So in 1955 you didn't know how much long staple cotton you were trying to destroy?

A. I never received a notice.

Q. I know that. But you said you disked the ends of the fields? A. That is correct.

Q. Did you destroy both Pima and short staple?

A. Yes.

Q. All right. How much long staple did you intend to destroy?

A. Well, I didn't have a set figure in mind.

Q. All right. You never paid any attention to

(Testimony of Rex L. Neely.)

the entries on your marketing card which showed how much you were planted, purportedly showed how much you were planted, and how much you were allotted?

A. That is correct. In what year? [373]

Q. 1955, 1956, 1954, any of them.

A. That's correct.

Q. So you never paid any attention to any of the years, then, or did you just check 1954?

A. I don't remember checking them at the time, any time.

Q. All right. Now, in 1956 you received an allotment notice which gives you your original allotment, the allotment for that Pinal County farm.

Thereafter, did you not receive a revised allotment notice bringing the total up to what you thought you had secured from Burns?

A. No. I am not sure that I did. Do you mean the white copy?

Q. Yes, if you have a white, or a yellow, or any other number, I would be glad to see it.

A. No. I am not sure that I have received a revised copy.

Q. Well, this 19 for identification, or this 19 you have identified for your counsel, that is the one you turned over to the agents, wasn't it?

A. This is the Notice of Allotment, yes.

Q. That is the one you turned over to the agents, isn't it?

A. I believe so.

Q. That is the one that your counsel had you identify awhile ago, isn't it? [374]

(Testimony of Rex L. Neely.)

A. Yes, sir.

Q. In other words, this one is dated December 1st, 1955, sent to the farmer telling him what his allotment for the coming year will be, for the 1956 crop year, for Upland cotton, you are going to have 306.7 acres of cotton allotment? A. Yes, sir.

Q. That is what these notices are designed to do, isn't it? A. Yes.

Q. All right. Now, you wanted to get additional allotment over and above your 306.7, so you went to Short about the Burns place, is that correct?

A. That is correct.

Q. Now, that year you were only able to secure 60 acres of cotton allotment, wasn't it? When I use these terms "60", if it is 60 point something or other, I am not going to hold you to the exact fraction.

A. Short said that Burns had an allotment of 60 acres, short staple allotment.

Q. About 60 acres? A. Yes.

Q. Thereafter, did you ever receive any notice similar to this which would show that you had an allotment of 366.7 acres of cotton allotment?

A. No, sir, I don't believe I did. I can't find it, anyway. [376]

Q. In other words, you have searched your records, haven't you?

A. I gave them all the records that I could find, or thought of at that time.

Q. Incidentally, where did this sublease come from?

(Testimony of Rex L. Neely.)

A. As I had stated before, I overlooked that part of it. I mean, I forgot to give it to the agents.

Q. It was on that bureau drawer there, or not bureau, a buffet drawer where you kept your papers, wasn't it?

A. I believe so.

Q. And it was in that same place?

A. I don't know whether it was in the same drawer or not.

Q. That is this Defendant's Exhibit I. Mr. Burns' signature, does it appear thereon?

A. No, sir, it does not.

Q. Joe Short's signature as witness?

A. No, sir.

Q. And that other gal's signature, as witnessing?

A. No.

Q. But this was all done at the same time, wasn't it?

A. I got this at the same time I got the lease.

Q. You got this at the same time you got the lease. All right. Now, in 1956, how much did you figure you had planted in 1956?

A. I didn't know how much I had planted. I knew I was—I had——

Q. You knew you were substantially overplanted?

A. I knew I had some overplanting.

Q. Even including Burns', you would have had an allotment of 366, and you were measured 100 acres over that, weren't you?

A. I was told that it was measured over, yes. I didn't know.

(Testimony of Rex L. Neely.)

Q. How much did you think you had planted?

A. I didn't.

Q. You didn't know how much you were planted?

A. Not for sure, no.

Q. How much did you intend to plant?

A. I don't know that.

Q. You don't know that either. All right. Here is 11-D. It shows you were measured 477 acres, 477.7 acres of cotton allotment. Not cotton allotment, acres in cotton. Excuse me. And your allotment, even with the Burns thing, was 366 something.

A. Yes, sir.

Q. Now, we have heard that Mr. Short was supposed to have told you that you were substantially overplanted around June or July of 1956.

Do you remember such a conversation with Joe?

A. No, sir, I do not.

Q. You don't remember such a conversation, or are you [377] willing to go so far as to say it did not happen?

A. In June?

Q. In June or July. We will even go to August.

A. I believe that is correct.

Q. In June, July, or August, Short never told you you were overplanted?

A. No, sir.

Q. All right, did you know that he had had a stroke?

A. I had heard that he had a stroke, yes, sir.

Q. All right. When you went to the office, there was no discussion about your planting condition?

A. No, sir, I inquired about my planting condition.

(Testimony of Rex L. Neely.)

Q. And what were you told?

A. I was told that my file, or my measurement was not at the office.

Q. Oh. When did you first inquire?

A. I can't specifically set a date. I know I was in there along in June and July.

Q. You were in the office in June or July to find out what your planted condition was?

A. Also about my ACP practice.

Q. You were doing another ditch here from "B" across to here (indicating on diagram)?

A. Yes, I believe that is so.

Q. You never received any information as to your planted [378] condition, as to your measurements?

A. Not until way late in December.

Q. Way late in December?

A. December 28th, I believe.

Q. You were told then, whenever you went in there in June or July, that your form could not be found?

A. That is correct.

Q. By whom were you told?

A. I believe it was either Mrs. Golsten or H. L. Mathis.

Q. Did you contact Short at all about the condition of your measured acres?

A. No, he was not in the office, as I recall. I don't remember seeing him.

Q. At the time that you received your Marketing Card for 1956, you knew you were substantially overplanted, didn't you?

(Testimony of Rex L. Neely.)

A. I knew I was overplanted, yes, sir.

Q. When you saw Short in December of 1956, what was your conversation with him?

A. On what date?

Q. Well, I believe any date in December, did you see Joe Short?

A. I believe I saw him on the 19th.

Q. All right. What did you see him about?

Mr. Whitney: 19th of what, Mr. Neely?

The Witness: 19th of December, 1956. [379]

Q. (By Mr. Holohan): What did you go to see him about?

A. I was in the office not necessarily to see him, but I was interested in my ACP program. My soil bank. And also to find out about my overplant, my planting.

Q. To find out about your overplant, all right. Let us skip the soil bank and the ACP, and go to the overplant.

What was the conversation between you and Short on that?

A. He met me in the outer office there. Asked me if I had been measured, and I told him——

Q. This is in December of 1956?

A. That is correct.

Q. He asked you if you had been measured?

A. Asked me if I had been measured.

Q. Yes. That is something that happened way back in June, isn't it?

A. That is right.

Q. Go ahead.

(Testimony of Rex L. Neely.)

A. And I told him to the best of my knowledge that I hadn't. He stated that——

Q. You said you hadn't been measured?

A. Well, I am getting a little ahead of my story there. He said there was some investigators checking around, and he wanted to know if they had been out to my place, and I told him that as far as I knew, they hadn't. He just wanted to [380] know if they had measured the place, and I told him——

Q. He wanted to know if they had measured the place. All right, go ahead.

A. And I am not sure at that time he told me what to do about my overplant, or not.

Q. Did you tell him you were overplanted?

A. I believe I told him I was overplanted; at that time I thought I was overplanted.

Q. Did he get your form, the 578, to look at?

A. No, sir, he did not.

Q. Now, these 578's again, for instance, like 11-D. A. Yes, sir.

Q. Your measured acreage over in the various columns here, the final one being "G" here, showing your final measured acres, when you go in there and sign up, you haven't been paying any attention to that, huh?

A. I didn't pay any attention to this one, no.

Q. You didn't pay any attention to this one, being 11-D in 1956, and I take it you didn't pay any attention to the one in 1955?

A. I don't believe so, no, sir.

(Testimony of Rex L. Neely.)

Q. When Mathis and Wolf came out to measure your place a few weeks later, in December, did you ever ask them whether they had talked to Short before they came to measure your place?

A. I asked them that on the day, I believe on the day that [381] they came to measure my farm.

Q. All right. What did you say to them?

A. I wanted to know if they knew of the Burns allotment.

Q. Did you ask them whether they talked to Short?

A. I believe I asked them if they had seen Mr. Short.

Q. All right. Had Joe Short suggested to you on this December 19th meeting that you request a remeasurement?

A. I am not positive of that, no, sir.

Q. Well, they have it in your statement here, which is Government's Exhibit 24. Short was there at the time,—I am reading from the statement:

“Short was there at the time, and he reminded me that I was overplanted, and asked me if I had plowed up any cotton. I told him I had not destroyed any. He said there was an investigation going on, that I had better request the measurement, and pay the penalty of the excess cotton.”

Do you remember it as happening that way?

A. It could have. That may be.

Q. Is that what you told Mr. Johnson had happened?

A. I believe I told him.

Q. You believe you told him that?

A. Yes.

(Testimony of Rex L. Neely.)

Q. All right. "However, I did not plow up any cotton after talking to Short on the 19th, because I had already [382] started the picking by that time, and it was too late."

Did you tell Johnson that?

A. Yes, I believe so.

Q. And that was correct, wasn't it? This was well into December? A. Yes.

Q. Now, your counsel made reference again to the statement, Government's Exhibit 24, in which this sentence was read, and I didn't get an answer to that:

"I guess I thought I might get by without plowing up my excess cotton in 1956."

Did you make such a statement to Mr. Johnson?

A. I made that statement, I believe I said that I thought I might get by without plowing up any of my cotton until a penalty was assessed me.

Q. Is that the way you told it to him?

A. I am not sure. I wasn't sure.

Q. But that's what you meant?

A. Yes, sir.

Q. Regarding this penalty business, then, you were at all times willing to pay the penalty, any penalty that was assessed against the land?

A. Against the land.

Q. Well, assessed for the overplant?

A. Yes, I paid an overplant in Maricopa County, and I would have—— [383]

Q. I mean, you were willing, then, to pay the penalty for the 1956 overplant, too? A. Yes.

(Testimony of Rex L. Neely.)

Q. In other words, the answer to your last question is—— A. Yes, sir.

Q. All right. Then the only reason that you didn't fill out the forms that your counsel introduced in evidence is because he wouldn't let you do it, isn't that right? A. That is correct.

Q. Because you didn't have anything to hide, did you? A. No, sir.

Q. That all the information that could have been put into those forms would be similar to that which you are telling us here today. It would have been similar to that that you already told the agents? A. Yes, sir.

Q. Now, you paid \$20 an acre in 1955 for the short staple extra allotment from Short?

A. Yes, sir.

Q. That was a bargain price in 1955, too, wasn't it? A. Yes.

Q. It was not uncommon for people to pay \$60 an acre to lease land for combination purposes, was it?

A. No, sir. I don't know exactly what the market price was. [384]

Q. You say you don't know what it was. Wasn't it a matter of common knowledge down in Pinal County? A. Not to my knowledge, no.

Q. It was not to your knowledge?

A. Not to my knowledge, no. I knew some that had gone for \$35 and \$40.

Q. So you knew of specific instances when they

(Testimony of Rex L. Neely.)

were drawing \$15 to \$20 more than you were having to pay? A. Yes, sir.

Q. So in 1956, you had to pay \$25 an acre?

A. Yes, sir.

Q. And again you have testified you considered that a bargain?

A. That is the price that the Burns farm allotment went at.

Q. And you considered they were charging too little for it, didn't you say that?

A. I stated that I thought it was worth more, yes.

Q. And that is why this extra money was thrown in the till? A. Yes, sir.

Q. Again referring to your statement on that matter:

"To the best of my recollection at this time, the rate asked by Short for 1956 was \$25 per acre, and I added \$250 to the check to assist Short with [385] hospital expenses, as I had heard that his wife was going to have an operation. I was willing to pay the higher price per acre because I left that the allotment was worth more in 1956 than I had been paying."

Did you tell Mr. Johnson that?

A. Yes. I believe that is correct.

Q. Do you agree with that at this time?

A. Yes, I believe it is worth more than I had been paying.

Q. Did you also add \$250 to the check to assist Short with hospital expenses?

(Testimony of Rex L. Neely.)

A. I added \$250 to the check because I felt that the cotton lease was worth more than that.

Q. Did you tell the agent you had added the \$250 to assist Short with his hospital expenses?

A. I may have.

Q. All right. Approximately how many times were you interviewed by Mr. Johnson, either alone or in company with Mr. Kennedy?

A. Two or three times.

Q. It would be a lot more than that, wouldn't it?

A. Possibly, yes.

Q. There was two times in January alone, weren't there? A. Three or four.

Q. And probably five or six?

A. Well, I never kept track of them, no, sir.

Q. All right. Now, in these years when you had the conversations with Short about getting the extra allotment, particularly the years 1955 and 1956, I will start with 1956, this is for the crop year 1956, for which you paid him in December of 1955.

A. Yes, sir.

Q. Now, when you paid him in December of 1955, you had already received your allotment notice for the 1956 crop year, showing what your allotment was, hadn't you?

A. I believe that form showed that.

Q. Yes. It is dated December 1st, and to the best of your recollection, you had already received that before you paid Short for the extra allotment that you were to get for 1956?

A. The dates indicate that, yes.

(Testimony of Rex L. Neely.)

Q. Is that to the best of your recollection, too? Do you find any reason to disagree with the dates at all?

A. Well, when, I believe I called Mr. Short at the office, and asked him sometime prior to this.

Q. Sometime prior to December 9th, 1955?

A. Yes. If the Burns farm was going to be available for lease.

Q. And having received an affirmative answer— **A.** He didn't at that time.

Q. I see.

A. Stating that he had to get in contact with Mr. Burns [387] and find out if it was available, and, if so, how much.

Q. Now, in 1955, or 1954, for the crop year 1955, your check is dated in November of that year?

A. Yes, sir.

Q. Now, do you recall whether you had already received your allotment notice for the 1955 year by that time? **A.** No, I do not recall.

Q. I will hand you the allotment notice for that year, Government's Exhibit 18-A, which is dated November 12, 1954. **A.** Yes, sir.

Q. All right, did you pay Short for allotment before you got your notice, then?

A. No. This is November 12th.

Q. And this is November 22nd.

A. And November 22nd.

Q. Then, to the best of your recollection, you had your allotment notice, and then you paid Short for extra allotment, is that correct?

(Testimony of Rex L. Neely.)

A. For the Burns lease.

Q. For the Burns lease. Then if you already had your allotment notice, then this ink, of course, was placed on there sometime thereafter, wasn't it?

A. I don't know what time it was placed there. I don't recall.

Q. Did you place it on there?

A. No, sir. [388]

The Court: We will have our afternoon recess.

(Recess.)

The Court: You may continue.

Q. (By Mr. Holohan): During the recess, Mr. Neely, you may have had a little chance to reflect, and so forth. Are you satisfied with your testimony on the ACP that you have given me?

A. In reference to what?

Q. 1954.

A. Well, it is a little hazy. I mean, that covers lots of things.

Q. In other words, according to your version on your land leveling, you have an application being made for land leveling practice which was already finished, and the documents, the file, show inspections having been made sometime in the summertime?

A. Well, if they indicated that, it isn't to my knowledge.

Q. So, in other words, your land leveling was done early in 1954, and I believe you stated the month as April when it was finished. In fact, you were planted in April, 1954?

(Testimony of Rex L. Neely.)

A. I don't know whether it was completed, practically through.

Q. You were practically through planting in April, 1954? A. Yes. [389]

Q. This is 11-E, which is a notice of farm acreage allotment for the year 1956, but it was dated December 1st, 1956. A. Yes, sir.

Q. Do you remember Mr. Mathis, H. L. Mathis, testifying earlier in the case about the preparation of that notice? A. Somewhat, yes.

Q. Did you ever receive the white copy of that?

A. I couldn't swear to that. I could have, and it could have been misplaced. I must have, though.

Q. You must have? A. Yes.

Q. Why?

A. Because this is a duplicate copy of it.

Q. That is dated December 1st, 1956. You had received your notice of cotton allotment for the 1956 crop year in December of 1955, right?

A. Yes, sir.

Q. Now, we have this one which Mathis has described as being made out at the direction of Joe Short in December of 1956, or around that period, November or December.

A. I know nothing of it. I don't know how come it was, I don't know anything that went on in that office.

Q. Did you get the white copy, is all I am interested in?

A. I can't swear to it. I can't find it, if I did.

Q. That would be an unusual thing, to receive

(Testimony of Rex L. Neely.)

your revised [390] notice while you were picking the 1956 crop, wouldn't it?

A. It seems to me to be, yes.

Q. It would be unusual, wouldn't it?

A. Yes.

Q. Then you have never been able to find a white copy that would correspond to this?

A. If one was mailed, no.

Q. To the best of your recollection, do you ever remember receiving such a copy?

A. I can't—I just don't know.

Mr. Holohan: Your witness.

Redirect Examination

Q. (By Mr. Whitney): Just a question or two, Mr. Neely. You never got paid for land leveling practice in Pinal County for the year 1954, for land leveling practice?

A. No, sir, I don't believe I did.

Q. But you did some land leveling in the early part of 1954?

A. Yes. We leveled Field Number 4.

Q. And wasn't that turned down as being sub-standard? Do you know what I mean by sub-standard?

A. Yes. It could have been, yes, sir.

Q. Well, it was turned down, anyway? [391]

A. Yes, sir, it was turned down.

Q. By whom?

A. I can't recall the field man's name.

Q. Did he talk to you about it?

(Testimony of Rex L. Neely.)

A. It was either he or Ray Bates, I don't recall which one.

Q. Who is Ray Bates? A. He is the head.

Q. Head of the office? A. ACP office.

Q. ACP Program? A. Yes.

Q. Well, whoever talked to you, what did they tell you was wrong with them, or if you remember?

A. As I recall, we had to do a little more work on it.

Q. And it was too late to do it?

A. No, it wasn't too late, it was that I just wanted to get the crop in as soon as possible, and not wait on the rechecking of the surveyors.

Q. In other words, if you had done that little more work that they required, then waited for them to check on it again, it would be too late to have planted your crop, is that what you mean?

A. It would have been a later crop, yes.

Q. Now, with reference to this exhibit that Mr. Holohan asked you about, Defendant's Exhibit F in evidence, which is [392] a letter dated October 11, 1957, from Mr. Elsberry, with the forms attached, do you remember bringing that letter and those forms to my office?

A. Yes, sir, I do.

Q. Do you remember what I said to you at that time?

A. You said, "Let me take care of this," I believe.

Q. In other words, didn't I tell you that the

(Testimony of Rex L. Neely.)

indictment had been returned, and not to sign anything? A. Yes, sir, that is correct.

Q. I think you testified on direct examination that in 1953, after the destruction of some cotton, that you had thought you were in compliance, is that correct? A. 1953?

Q. No, 1955. A. Yes, sir.

Mr. Whitney: That is all.

Mr. Holohan: We have nothing further.

The Court: That will be all.

Mr. Stanfield: No questions of this witness.

(Witness excused.)

Mr. Whitney: I call Mr. Davis. [393]

TOM DAVIS

called as a witness in behalf of the Defendant Neely, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Whitney): Will you state your name, please? A. Tom Davis.

Q. And you are the office manager of the Stabilization——

A. Pinal County Agricultural Stabilization and Conservation, yes, sir.

Q. At Casa Grande? A. Yes.

Q. And you have charge of all the records there?

A. Yes, sir.

Q. And have you the records for 1953 and 1954, with reference to ACP practices?

(Testimony of Tom Davis.)

A. I have the 1954.

Q. And those records are part of the records kept in the ordinary course of business?

A. Yes, sir.

Mr. Whitney: May I have these marked just for identification purposes, for the record.

(Documents marked for identification.)

Q. (By Mr. Whitney): Mr. Davis, for the purpose of the [394] record here, I am handing you Defendant's Exhibits N, O, P, and Q for identification.

Those are the records that you testified were part of the records of the office?

A. Yes, sir.

Q. At Casa Grande? A. Yes, sir.

Q. And they are kept in the ordinary, I mean, in the regular course of business of that office?

A. Exhibits O, P, and Q, yes, sir.

Exhibit N is an outdated performance handbook which is still retained there, but it is not a portion of the official records.

Q. But it is in use, isn't it?

A. It was no longer used. It is merely being retained as one that was used.

Q. But it was used in the ordinary course of business? A. Yes, sir.

Q. And it was in the regular course of business to keep those documents there in the manner they are kept? A. These documents?

Q. Yes, sir, that is, O, P, and Q?

A. O, P, and Q, yes, sir.

(Testimony of Tom Davis.)

Q. How about N at the time?

A. At that time. At that time, I couldn't say, sir. [395]

Q. What time did you say that you first went there to work? A. February of this year.

Q. February of 1958? A. Yes, sir.

Mr. Whitney: That is all.

The Court: Is that all from this witness?

Mr. Whitney: I offer Defendant's Exhibits N, O, P, and Q in evidence.

Mr. Holohan: Objection. Absolutely no foundation.

Mr. Whitney: Well, that's right. Probably you are right about that. I will get that later. That's all Mr. Davis.

Mr. Hays: May this witness be excused?

Mr. Whitney: I think so.

The Court: You are excused.

(Witness excused.)

Mr. Whitney: That is all.

Mr. Stanfield: If the Court please, at this time I would like to request an early recess on the basis that Mr. Short, whom I planned to call as a witness this afternoon, is not feeling too well, of course, with the Court's indulgence.

The Court: All right. We will suspend until ten in the morning. Keep in mind the Court's admonition. [396]

(Thereupon an adjournment was taken to the following morning, Wednesday, September 17, 1958, at ten o'clock a.m.) [397]

Wednesday, September 17, 1958

Ten O'Clock A.M.

Court convened pursuant to adjournment.

The Court: You may continue with the trial of this case.

Mr. Stanfield: I call Ralph Ashburn.

RALPH ASHBURN

called as a witness in behalf of the Defendant Short, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Stanfield): What is your name?

A. Ralph Ashburn. [398]

Q. Where do you live? A. Casa Grande.

Q. How long have you lived there?

A. I have been there since 1941.

Q. What is your trade or occupation?

A. In the crop finance business.

Q. I might ask with whom?

A. What's that?

Q. With whom are you employed?

A. Casa Grande Cotton Finance Company.

Q. Are you acquainted with the Defendant here, Joe L. Short? A. Yes, sir.

Q. How long have you known Mr. Short?

A. I have known him since he has been in Casa Grande, I believe 1953 or 1954. 1953, I believe it is.

Q. Is there any particular capacity in which you have known him?

A. Yes, in financing the crops in that area, and

(Testimony of Ralph Ashburn.)

particularly cotton, we have quite a little dealings with the triple A office on allotments and acreage there in respect to crop financing.

Q. Do you know Mr. Short's general reputation in the community for truth and veracity?

A. Yes, I do.

Q. And what is that reputation, good or bad?

A. Very good, so far as I know, yes. [399]

Q. Do you know Mr. Short's reputation in the community for honesty and integrity?

A. Well, I think it has all been very good, as far as any dealings with him.

Mr. Stanfield: No further questions.

Cross Examination

Q. (By Mr. Hays): Does the Defendant Short's brother have an interest in that company you work with?

A. No, sir, he has no interest.

Q. Is he employed there?

A. He is employed, yes, sir.

Mr. Hays: That is all.

The Witness: He isn't employed by the Casa Grande Cotton Finance Company, I might add. He is with the Gin Department.

Mr. Hays: That is all.

Mr. Whitney: No questions.

Mr. Stanfield: May this witness be permanently excused?

The Court: He may be.

(Witness excused.) [400]

Mr. Stanfield: Mr. Short, please.

JOE L. SHORT

Defendant herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Stanfield): Will you state your name, please. A. Joe L. Short.

Q. You are the Defendant Joe L. Short in this case? A. Yes.

Q. Mr. Short, can you hear me well enough?

A. Just barely hear you, Mr. Stanfield.

Q. You were one of the defendants, or you are, are you not? A. Yes, sir.

Q. Are you married, Mr. Short?

A. Yes, I have a wife and two daughters, one of them 13, one of them 15.

Q. Where do you live?

A. I live at a public housing project between Casa Grande and Coolidge.

Q. Where were you born, Mr. Short?

A. I was born in Oklahoma. [401]

Q. Where did you grow up?

A. I was raised in Oklahoma.

Q. You were employed, I believe, by the Pinal County ASC Office during the years 1953, part of 1953 and 1954, 1955, and most of 1956?

A. Yes.

Q. And what employment did you have with this office?

A. I started as a clerk, and among my other

(Testimony of Joe L. Short.)

duties, I was put in charge of the ACP in 1953, and then about in May, 1954, I became the office manager.

Q. When you worked for the ASC office, indirectly you worked for the Department of Agriculture, did you not? A. Yes.

Q. Had you previously to 1953 been employed by the Department of Agriculture? A. Yes.

Q. Where, and in what capacity?

A. In Stevens County, Oklahoma. I think I started there in 1938 as a clerk on the Range program, and later I was made a permanent employee, and worked there until 1940, when I went into the Army.

Q. Were you eventually separated from the Army? A. Yes.

Q. Do you recall the circumstances of your separation from the Army? [402]

A. Yes, sir. I had a jeep accident, and was in the hospital for awhile, and went before a board of officers, and they retired me from the Army, and discharged me without pension.

Q. When did these events occur?

A. In 1943.

Q. I didn't hear you. A. In 1943.

Q. Did you receive an honorable discharge, or otherwise? A. An honorable discharge.

Q. Were you subsequently employed in something besides the Army, then?

A. Yes. After I came out of the Army, I worked as a well logging engineer, as a salesman, both at

(Testimony of Joe L. Short.)

home and traveling on the road, and then worked in a woodworking shop, a cabinet shop.

Q. What is the extent of your education, Mr. Short?

A. I have about a high school education, and two years of college.

Q. Now, specifically what was your job with the ASC office when you first were employed in 1953?

A. First was as a clerk, and I was also put in charge of the ACP program, among other duties.

Q. How long were you in charge of that program?

A. Well, the ACP was a pretty good job, [403] I mean, there was lots of work to do, and the cotton allotments come on, and it was decided that they would hire somebody else, that is, the office manager decided that we would hire somebody else, and for awhile she worked under me, and then the ACP program was turned over to her.

I think I was in charge of the ACP program up until the first of May, 1954.

Q. Now, what was your salary as an employee of the Department of Agriculture in these jobs, Mr. Short?

A. I started at \$275 a month, and then when I was made office manager, I was getting \$345 a month, and then in July, 1956, I think that is the date, it was raised to \$450 a month.

Q. Now, would you by way of explanation, so that the Jury may have an opportunity to under-

(Testimony of Joe L. Short.)

stand the situation, briefly explain the function of the ASC Office, if you know.

A. Well, the ASC Office goes back, and it is a line of temporary agencies. It started in the early thirties.

At that time it was called the Bankhead Plan.

Mr. Holohan: We will object to going into all this. We believe it is immaterial at this time.

The Court: All right, sustained.

Mr. Stanfield: If the Court please, I would like to have this witness testify on defining what the ASC Committee is.

The Court: All right, during the time he was there. [404] We can't go clear back into the thirties.

Q. (By Mr. Stanfield): Mr. Short, during the period you were so employed as office manager, briefly would you outline the organizational plan of the ASC?

A. Well, the office manager hires the employees of the County Office, and he is in charge of several different programs.

Among those was the ACP program, the cotton program, the cotton marketing quota program, the emergency wool, the CCC loans and credits, and sometimes we had an emergency feed program.

And then he had to administer the administration of the office, including budgets and salaries, and stuff like that.

Q. Do you recall during your stay there who the County Committeemen were?

A. Yes, sir. When I first went to work, it was

(Testimony of Joe L. Short.)

Mr. Robert Hamilton, John Beggs, and Rodney Elsberry.

In 1954 it was changed, and Johnnie Beggs, Rodney Elsberry, and Henry D. Haley were the County Committee until the time I resigned.

Q. Would you briefly describe what your particular duties as office manager were during the time you were so employed?

A. Well, of course, as I said before, I was in charge of all these programs. Part of the time, I delegated part of the [405] authority to somebody else, but I wasn't a policy maker.

The County Committee is the policy maker. So when the County Committee decided what would be their opinion on a certain case, if other cases come up I could handle it in the same way.

Q. Now, with respect to the cotton allotment program, I believe you said you were responsible for that, for the administration of that program, did you not? A. Yes.

Q. Briefly, but specifically, what were your duties in connection with that?

A. Well, of course, the cotton allotment program comes down from the State Committee. As far as the County Office is concerned, I had to check the County total allotment to see if it was what we thought was correct.

Then the County Committee decided how much they would put into a reserve. The rest of it I will probably call a computed acreage allotment. Our allotment, that part of the allotment was divided

(Testimony of Joe L. Short.)

among the farms on different formulas, and these formulas resulted in a factor which was applied to the different deals that went to make up this formula.

Then the County Committee gave me a formula for the reserve. I added that to the farms' allotment, and then the County Committee had to approve all of it.

Then we made the cotton allotment notice. [406] They had to approve those. Of course we sent those cotton allotments out.

After that, there is time for appeal, and on an appeal they would usually come into the office and talk to me, most of the time. Once in a while they would talk to somebody else, and come to me later.

Some of those appeals went to the County Committee. Some of those went to the Review Board.

If it was going to the Review Board, we had certain forms to make out.

If it was going to the County Committee, I would make notes and explain it to the County Committee, and lots of times have the farmers come before the County Committee.

Let's see. About the next thing was the Reviewing Committee.

I sat with the Reviewing Committee, and in fact transcribed all of their hearings. I made their determinations out, in fact, their findings and determinations, and that had to go out.

At about that time, the farmers were changing their croplands, or buying new farms, leasing new

(Testimony of Joe L. Short.)

farms, or something like that, and then you get into the reconstitutions.

And also in that county we had a release and reapportionment that was coming up at that time.

And that goes on until it is time that the cotton [407] has been planted. Then we started measuring.

Q. You spoke of reviews and appeals, Mr. Short.

Have you known in the various years that you were office manager, how many appeals were heard by the Review Committee in your county?

Mr. Holohan: I object to that as immaterial.

The Court: Sustained.

Q. (By Mr. Stanfield): You were speaking, Mr. Short, about the measurement. What time of year is the first measurement usually done?

A. Well, usually it starts in June. As soon as school is out.

Q. Who does the measuring?

A. We hired some part-time employees, and, of course, the wages that we could pay, we couldn't hire engineers, and stuff like that, but we hired high school boys most of the time.

Q. Were there instances ever when the measurements were incorrect?

A. Well, in the first month, of course, when you are hiring a new bunch of measuring boys, you are going to make some mistakes in the first month. I would say 25 percent of them have mistakes in them.

Of course, the regulations say we check them, so

(Testimony of Joe L. Short.)

we checked them, so after the first month I imagine the mistakes would be 10 percent, or less. [408]

Q. During the years in which you were the office manager, what was your annual budget, if you know?

Mr. Holohan: I object to that as immaterial.

The Court: I don't see the materiality of it. What is the purpose?

Mr. Stanfield: Your Honor, a great deal of the Government's case is centered around the material contained on government forms which were processed in this particular office. And I would like to determine the incidence of mistakes, if they could be accounted for in that manner.

Mr. Holohan: I don't see what the budget has to do with mistakes.

The Court: You mean they didn't have money enough to employ competent personnel? Is that what you want to show?

Mr. Stanfield: Yes, in part, your Honor.

The Court: What is the other part?

Mr. Stanfield: In other words, I am not trying to attribute everything to a low budget, or improper personnel, but I would like to go into the fact he did have personnel trouble.

The Court: Ask him about that, then.

Q. (By Mr. Stanfield): Now, in connection with the operation of the office, Mr. Short, did you have personnel trouble?

A. Yes. Let me give you a figure. Say we could

(Testimony of Joe L. Short.)

only pay [409] about \$250 a month, or maybe \$275, as I started in with the office on.

It was hard to hire a college engineer, or something like that. We had to get the people, the best that we could get.

Q. Did you have a considerable turnover as a result of that problem? A. Well, yes.

Q. Going directly to the question of Mr. Neely, do you know Rex Neely? A. Yes, sir.

Q. Do you remember when you first met him?

A. I think the first time I met him was in the fall of 1953, but I don't know exactly what the occasion was. It was in the office, as far as that is concerned.

Q. Do you have any recollection of the next meeting between you and him?

A. Well, there may have been other meetings, but the one that I remember particularly, at this particular time, was in March of 1954.

Q. Is this a conversation that you recall that occurred in that month? A. Yes, sir.

Q. Do you remember where that took place, and who was present? [410]

A. Mr. Neely and I were there. It was in the ASC Office in Casa Grande.

Q. Do you recall what was said in that conversation?

A. Yes, sir. Mr. Neely asked me if I knew where there might be any extra cotton allotment that I might get transferred to his place. I told

(Testimony of Joe L. Short.)

him I didn't know, but I would check around and find out about it.

Now, this wasn't an unusual question, in fact, half of the farmers asked me that question one time or another.

Q. In that connection, did you have a later conversation with Mr. Neely? A. Yes, sir.

Q. Do you remember when that occurred, and where, and who was present?

A. Well, it was in the next few days. I don't remember the exact date, but there was a telephone conversation. I don't know who originated the call. I just really don't remember, but Mr. Neely talked to me.

He said, "Did you find me any cotton allotment?" And I said, "Yes, I think so."

He said, "Well, I will come down to the office and talk to you about it."

Q. Did he come down and talk to you?

A. Yes.

Q. Do you remember when, and who was present? [411]

A. Well, it was just Mr. Neely and me, and it was in the ASC Office in Casa Grande, and I don't remember an actual date.

Probably by looking at the evidence I can tell you the date, or what I think is the date.

Q. Would it have been approximately the 20th of March?

A. I think that's around the date, yes, sir.

Q. Do you remember what was said during that

(Testimony of Joe L. Short.)

conversation? A. Yes, sir.

Q. Would you describe the conversation.

A. Mr. Neely asked me, in other words, I had already talked to him on the telephone. He said something about did I find some allotment. I said, yes, I know *whether* there is 81 acres that you can get. "The price for it will be \$20 an acre, and of course in this kind of a transaction, usually there is a lease made out to the operator, and then he subleases it back to the lessor, and I don't have the lease now. I can get it for you if you want it."

He went out to his pickup, or his car, whatever he was driving, and wrote me out a check for \$1620.

Q. Was there any discussion at that conversation about to whom the check should be paid, or made payable?

A. Yes, he asked me who to make the payee, and I told him to make it to me, and I would see that the owner got his part of it. [412]

Q. Now, do you remember whether or not the name W. R. Burns was mentioned during this conversation? A. I don't believe so, sir.

Q. In connection with this particular incident, Mr. Short, do you recall what happened next that was of significance?

A. Well, the payment was returned by the bank.

Q. What do you mean, the payment was returned?

A. I mean the check was returned. I am sorry. I got the wrong phrase.

(Testimony of Joe L. Short.)

Q. Now, did you have some additional conversation with Mr. Neely in regard to that matter?

A. Yes, sir.

Q. When did it occur, and where, and who was present?

A. Well, I don't know the exact date, but it was within, say, maybe a week, something like that.

He came out, and I don't remember whether he was stopped in front of my house and I came out the door and noticed him sitting out there, or whether I drove down to the grocery store and he was down there, and I saw him, but anyway he was in the car, and I was in the car.

Anyway, I got out and got in his car, and the conversation went like this:

"Well, this check has been stopped, or you didn't get your money." Mr. Neely said, "I was a little leery of it. Since then I have checked around with several people, [413] but it looks like it might be all right. Is it all right?"

I told him it was. I also told him if he wanted to drop it, just drop it, when I got the check back I would give it back to him.

Q. In this connection, what if anything happened next? A. What?

Q. In connection with this proposition, what happened next, if anything?

A. In other words, that conversation was about stopped there, as much as I remember of it.

And later he told me at that time that he would

(Testimony of Joe L. Short.)

come into the office and make a new one, make me out a new check.

Q. Did he do that?

A. He came in later, but before that I did something else on that deal.

Q. What was that?

A. I went out and got some standard lease forms. You can buy those in stationery stores, and stuff like that. I got several of them, and I made up a lease and a sublease.

Q. Do you remember approximately when that was?

A. When I made the lease?

Q. Yes.

A. Around, oh, this is an approximation. Around the 30th or the first of April. 30th of March or 1st of April, something like that. [414]

Q. Did Mr. Neely subsequently come in to see you?

A. Yes.

Q. Did you have a conversation with him?

A. Yes.

Q. When did that happen, and who was present?

A. Oh, he came in, I don't know for sure about the date, say, maybe it was the first part of April, or sometime after the two previous conversations.

Q. Do you know the check that went through the bank is dated April 5th? Was that the date?

A. That is probably the date, as far as that is concerned. Say he came in on April 5th. At that time I had prepared the lease forms, and I think I prepared at the same time the release forms for the farm.

(Testimony of Joe L. Short.)

When Mr. Neely came in I got them out of the drawer of my desk, and put them on top of my desk, and I said, "You will have to sign the original of these."

He signed them. The other one had already been put in there, which I signed.

And then I took it in another part of the office, and asked one of the clerks to witness it, brought it back, and witnessed it myself.

Q. Handing you Government's Exhibit 15 in evidence, which is the Burns lease, and Defendant's Exhibit Number I in evidence, which is the sublease, do you recognize those leases? [415]

A. Yes, sir.

Q. What are they?

A. These are the lease and sublease that I made out before Mr. Neely came in.

Q. What is the date on each of those leases?

A. 30th of March on both of them.

Q. Do you know whether or not that is the day you prepared them?

A. I am pretty sure that is the day I prepared them, sir.

Q. On the lease form, there is a name signed down there in the left-hand corner, right there. Can you read that name?

A. I know whose name it is. It is Lena H. Andrews, and it is spelled differently.

Q. Is that signed as a witness on there?

A. After I had Mr. Neely sign it, I took it in to another part of the office. In other words, there

(Testimony of Joe L. Short.)

is a stub wall between where I was sitting and where she was sitting. I took it in there and said, "Will you witness this." She witnessed this and I brought it back in, and then I signed it as a witness.

Q. That is the same person, the person that signed this, Lena H. Andrews? A. Yes.

Q. Do you know whether you had her witness the sublease?

A. Yes, I took both of them in there at the same time, I am pretty sure of that. [416]

Q. Do you know how many copies of the sublease you made?

A. Made an original and one carbon copy.

Q. I think we know what happened to the carbon copy. Do you know what happened to the original?

A. Yes. It was in the bottom drawer of my desk, and I don't know exactly when it disappeared.

In fact, I might have thrown it away. It was up in 1955, or in the early part of 1956. Now, the original of the sublease was in there too, so when one of them disappeared, I imagine the other one disappeared.

Q. Going back to the conversation that occurred on what you have estimated to be April 5, 1954, aside from his giving you the check, was there any further discussion of the matter, anything other than you have just now stated?

A. I think at that particular time I had his allotment notice, a revised allotment notice made out, and gave that to him in the same conversation.

(Testimony of Joe L. Short.)

Q. Why was that done, Mr. Short?

A. Well, there were lots of farms in that county that was released acreage, and it was reapportioned to other farms. I didn't know about his financial deal for the financing of his cotton. He might have needed that cotton allotment.

Q. What I want to know is, why did you do this particular thing at this particular time, if there was a reason? [417]

A. Well, you kind of lost me, Mr. Stanfield. I don't know exactly what you mean.

Q. You stated after you prepared the leases and gave them to him, he gave you the check?

A. Yes.

Q. You drew up and prepared a revised notice of allotment? A. Yes.

Q. This was in April of 1954? A. Yes.

Q. Now, was there any particular reason for revising his allotment at that particular time and place?

A. Well, the only thing I could think of for your question is that a farmer, when he gets an allotment notice, that is his allotment.

Q. I don't think you understand, but I will go on.

During this conversation, was Mr. W. R. Burns as a person discussed? A. Yes.

Q. What was said about him?

A. I told him that the place I was taking some acreage off of was owned by a W. R. Burns, or he

(Testimony of Joe L. Short.)

was the operator, and of course the lease shows W. R. Burns.

Do you want to know the antecedents of this farm?

Q. No, I just want to know if you told him anything about Mr. Burns. [418]

A. Yes, at that time.

Q. That is all you said to him about Burns?

A. That's about it, yes.

Q. If you know, just how did you arrive at getting the so-called Burns lease? What were the steps you went through to acquire the cotton base to put on that lease?

A. Well, at that particular time, lots of farmers would come in to me and say, "I have an extra allotment." That was due to the, well, they might have horrible road conditions before them, or not enough water. Anyhow, different people came in and told me they had extra allotments. Lots of them were duplicates. We voided them. Now, on our original listing sheet there is a Farm 595. The name is in Julian Woodruff and Kemper Marley. That is on our original listing sheet, which we made out in the last part of November, or first part of December, 1953.

Of course, it was made out on the records we had at that time. The original allotment was mailed out. It was received by Julian Woodruff, and in February or March, Mrs. Woodruff came in and told me, a question that I had heard before, I think I got an extra allotment.

(Testimony of Joe L. Short.)

So I went through their farm programs, I went back through the listing sheets, and this 595 seemed to be the extra allotment.

Now, by checking it through, she said it was not [419] theirs. So she gave me the allotment back at that particular time.

As I said, we had been avoiding the duplicates, and stuff like that, but I went into the files of 595, changed one form, two forms, the worksheet, and the CN-360, I think that is the number, I used the original figures, but I changed the operator and owner on that place.

Now, in that way we had what I call a duplicate farm, or an abandoned farm, or whatever you want to call it.

Q. Now, did you discuss this mechanical act there with anyone?

A. Yes. I talked to Mr. Wolfe.

Q. Who was Mr. Wolfe?

A. At that time he was the office manager.

Q. Do you remember when this conversation occurred?

A. I can only give you the same dates that I gave you when Mrs. Woodruff come in, either in February or March.

Q. Do you know if anybody was present when you were talking about it?

A. Sir, I don't really remember.

Q. Do you know whether Mr. Mathis was present?

A. Mr. Mathis was not working in the office.

(Testimony of Joe L. Short.)

Q. Do you remember what was said in connection with this deal?

A. I told him we had another duplicate farm, that was the [420] name we called them, and I also told him that it would be better if we left it on the records.

There was a reason for that. We knew that the review committee, it was getting late in the year, and the Review Committee would come down there before long, and they would take all of our County Reserve, anything that the county committee had in reserve, the Review Committee could take.

After the Review Committee gets down and leaves, then if somebody else comes in and says, "I have got a legitimate gripe," and we go into their case and find out that they need some more allotment, then we could take it off of this duplicate farm.

Mr. Whitney: What kind of a farm?

The Witness: The duplicate. I said this is the term we originated down there.

Q. (By Mr. Stanfield): State, if you know, where the name W. R. Burns came from.

A. Sir, I don't think the name came from anywhere, except that I didn't know very many of the farmers. I probably knew half of them, or something like that.

When I was making a duplicate farm, to keep in the records, I went to the index and found out there was no W. R. Burns, or something like that, and used that name.

(Testimony of Joe L. Short.)

Q. It had no further significance than that?

A. No. It was a random name. [421]

Q. Do you know how much cotton you took from the so-called Burns farm, or the 595 farm and transferred to Mr. Neely?

A. The records show that I took probably 73 and a half acres from the Burns farm, and I used another seven acres that had been entrusted to me, and it wasn't the only ones that was entrusted to me.

Q. You stated earlier that you prepared at this time his revised notice of allotment?

A. I think that is right.

Q. Do you remember anything in connection with anything that occurred in connection with Mr. Neely's marketing card for 1954?

A. Well, some of it I imagine I remember. Some of it is going on the records.

In fact, I prepared most of the marketing cards for 1954, and probably he got the allotment card from me, and, in fact, it had my signature on it, I am sure.

Q. You mean the marketing card, is that what you mean? A. Yes.

Q. Mr. Short, I hand you Government's Exhibit 8 in evidence, which I probably cannot identify at all, so would you tell me what that is, if you know?

A. Well, this is a supplement to the listing sheet, and it has the release and reapportionment acres that were changed in Pinal County in 1954. [422]

Q. Insofar as the 73.5 acres from the so-called

(Testimony of Joe L. Short.)

Burns farm, was that gotten into the Neely farm by this same process?

A. Well, you can look at it that way.

In other words, anything that was released by the farmer goes into a pool.

Now, there were some applications, or something like that, where some of it was supposed to go, and those were filled, and you might say 73 and a half acres comes off of 595, and went on, say, number 19, as far as that is concerned.

But the released allotment, I think part of it come from 595.

Q. Is what you are saying that by the process of release and reapportionment, cotton base would be released from one farm, and was supposed to go into a pool?

A. Well, it actually had to go into a pool first.

Q. Was that within the rules? A. Yes.

Q. Now, what was unusual, if anything, about the way it came out of it?

A. Well, the reapportionment, after it goes into the pool, there was a kind of committee decision on that.

If somebody says, now, I have leased my place to Joe Smith over here, and he wants to release an allotment, [423] then it goes into the pool. He says "I want it reassigned to him," and the County Committee would honor that contract.

Q. What it amounted to would be the County Committee would ratify the deal between the farmers? A. Yes.

(Testimony of Joe L. Short.)

Q. Is that the process that you used for the 73.5 acres for Mr. Neely in 1954?

A. Part of it come from there, yes, sir.

Q. Are there other instances in that ledger of similar transactions?

A. Well, there are about, I would say about 500 of them in here, sir, that were about the same transactions. I didn't see the money change hands, but I think it changed hands.

Q. Is that for the year 1954 only?

A. Yes.

Q. Do you know what percentage of those deals you handled?

A. How many of them I handled?

Q. Yes. A. You mean the paper work?

Q. Yes.

A. Well, I had some part in handling all of them, because most of these release and reapportionments came to me, and then I took it up with the County Committee, or if the County Committee had already ruled with the same facts in evidence, I handled most of them. [424]

Q. Mr. Short, you have heard Mr. Kennedy say that the release and reapportionment was perfectly legal in 1954, but it was, I think he said, discouraged in 1955? That's what he said?

A. I think that's about what he said.

Q. Now, is that the process that you are talking about right now?

A. I think Mr. Kennedy is partly wrong, because the release and reapportionment is a part of

(Testimony of Joe L. Short.)

the act, That is not the secretary's regulations, and it is still in the law, as far as I am concerned, unless they changed it in the last Congress.

In other words, in 1954, '5, and '6, it was still a part of the act.

Q. Insofar as Mr. Kennedy testified, do you know what was wrong with the process?

A. The parts that I questioned the State Committee on, and the State Administrator, the administering officer, was I come in here and leased a deal to somebody, then I released it to the County Committee, and they give it to him, and it was approved in the State Office.

Q. Wasn't that perfectly legal and perfectly proper?

A. Well, according to them it was all right.

Q. You say they were several hundred of those for the year 1954? [425]

A. Yes.

Q. Do you know how many there were in 1955?

A. In 1955 they said we will not let you do that again. I mean, the State Committee said that, but you can still have release and reapportionments, but you will have to justify each one of them on its individual merits.

Q. How many did you have in 1955?

Mr. Holohan: I object to that as immaterial.

The Court: I think so.

Q. (By Mr. Stanfield): In connection with the 1955 allotment situation down there, Mr. Short, do you remember having any conversation with Mr. Neely about that?

A. Yes.

(Testimony of Joe L. Short.)

K. Do you remember when and where that conversation took place, and who was present?

A. Well, it seems like it was probably in November, 1954.

Q. What was said.

A. Mr. Neely said to me——

Q. First, let me ask you this. You haven't said where it was.

A. In the ASC Office, and Mr. Neely and me were the only ones in this conversation.

As far as I remember, Mr. Neely asked me can I get this lease again for 1955?

Did I say November, 1954? [426]

Q. Is that the way it was?

A. I thought I might have said 1955. Sometimes words don't come out the way I mean to say them.

Mr. Neely asked me about the lease. I don't know whether he said the Burns lease, or this lease, or something like that.

He said, "Can I get that again for 1955?"

I told him I didn't know, but I would find out.

Q. Is that the end of that conversation?

A. Well, there were actually two conversations. It might have been two. I am sure there was two, but that's all I remember for that conversation.

Q. Then you did have a later conversation?

A. Yes.

Q. Do you remember when, where, and who was present at that conversation?

A. Well, the same persons were present, and it

(Testimony of Joe L. Short.)

was in the same place, the County Office in Casa Grande.

At that particular time, Mr. Neely asked me if he could get the lease again, and I said yes, and told him that the allotment had went down. It was not 81 acres, it was, what was it, 70, that year?

Q. I think it was 70 something.

A. All right. Let me use the figure 70.

When the allotment had went down to around 70 acres, [427] and the same price per acre, or something like that, he wrote me out a check, and at that time I am pretty sure I prepared his revised notice.

Q. Do you know if that has been admitted in evidence here, that revised notice?

A. My memory is not that good, Mr. Stanfield. Are there two of them admitted for 1955?

Mr. Stanfield: I am advised it has not been admitted.

The Witness: I am sorry, Bill, but I think it is here.

I think I saw it.

Mr. Stanfield: If the Court please, may we check our admissions?

The Court: Yes.

We will have our morning recess.

(The morning recess was had.)

The Court: You may continue.

Mr. Stanfield: If the Court please, I would like to withdraw the witness from the stand and have a couple of character witnesses testify, so they can leave.

The Court: All right.

(The Witness Short was withdrawn.) [428]

GEORGE WATSON

called as a witness in behalf of the Defendant Short, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Stanfield): Will you state your name, please? A. George Watson.

Q. Where do you reside?

A. At 11-Mile Corner, near Casa Grande.

Q. How long have you lived there?

A. I lived there 12 years.

Q. What is your business or occupation?

A. I run a variety store.

Q. Is that the only business that you have?

A. No, I do farm work.

Q. Are you acquainted with the Defendant Joe L. Short? A. Yes, sir.

Q. How long have you known Mr. Short?

A. About five years.

Q. In what connection, if any, do you know him, aside from personal?

A. I don't hear very well.

Q. Did you have any dealings with Mr. Short, business dealings? [429]

A. What kind of dealings?

Q. Business dealings.

A. He trades at the store for the last five years with me, yes, sir.

(Testimony of George Watson.)

Q. Do you know what his general reputation in the community is for truth and veracity?

A. Very good, sir.

Q. Do you know what his general reputation in the community is for honesty and integrity?

A. As far as I know, it is very good.

Mr. Stanfield: Your witness.

Mr. Hays: No questions.

The Court: That will be all.

(Witness excused.)

Mr. Stanfield: Mr. Short, will you resume the stand.

JOE L. SHORT

resumed the stand.

Direct Examination—(Continued)

Q. (By Mr. Stanfield): Referring again to your conversation with Mr. Neely in, I believe it was, November, 1954, in connection with the 1955 allotment; you stated earlier that he had given you a check, [430] I believe, for \$1410?

A. Yes, that is right.

Q. Now, what did you say in connection with his allotment notices?

A. I had his allotment notices either made out then, or had made it out when he come in there. I think I made it out when he was there.

I gave him the original allotment notices, and kept the carbon copy, and I thought it was in the file, but since we have looked at the stuff that has been introduced into this case, it is not there.

(Testimony of Joe L. Short.)

Q. One moment. I will hand you Government's Exhibit 18-A, and Government's Exhibit 11-G in evidence, with the hope that you will recognize them.

What are those?

A. This 18-A is his original allotment notice off of the original listing sheet. It is not a revised notice.

Q. And how many acres does it provide for?

A. Well, it had 306.1.

Q. I see. And what is the 11-G?

A. 11-G is a copy of his original allotment off of the original listing sheet. No.

Yes, that is for Upland cotton, both of them.

Q. I see. Now, are either of those the original, or copies of the allotment notice that you prepared for him at [431] that time? A. No, sir.

Q. What did you prepare for him at that time?

A. I made another allotment notice on the same multi-set forms that these were, and it had about, let's see, 376.7 acres on it, or something like that.

Q. Do you remember whether or not you typed that? A. Yes, I typed it.

Q. Those are made in a multi-set, you say?

A. Yes.

Q. How many copies are in one of these multi-sets?

A. I have an original and one duplicate.

Q. What is done with each of those?

A. The original goes to the farm operator. The carbon copy will go in his farm folder.

(Testimony of Joe L. Short.)

Q. Do you have any recollection of what you did with the two separate copies that you prepared at that time?

A. I gave the original to Mr. Neely, and kept the carbon copy.

Q. And you say you kept the carbon copy. What do you mean, you kept it?

A. Well, I put it in the drawer of my desk at that particular time, and finally put it into his farm folder.

Q. I see.

A. There is something on here that I don't understand. [432]

Q. Let me ask you a question about that, Mr. Short. The original notice of farm allotment, that is, the original copy of the first one, has 306.1 acres typed in, and some very small pen inked writing in here, 70.6.

What if anything do you know about that inked in part?

A. Well, I don't know anything about it.

In other words, this allotment would have never gone out with 70.6 on it like it is here.

There would only have been one figure in here, the 306.1. That would have been all right, but any others we would have had to void it.

Q. Do you have any recollection of any allotments ever going out of that office, in which the actual numbers were written with a pen?

A. Not while I was there, sir.

(Testimony of Joe L. Short.)

Q. Do you know whether the regulations allowed such a practice?

A. That is against the regulations, sir.

Q. In other words, do you know anything whatever about the inked in figures?

A. No, sir, I don't know anything about it.

Q. Now, after you prepared this notice, revised notice of allotment for Mr. Neely, and gave him the original copy, was it necessary to do anything with the remainder of the [433] office records in connection with this transaction?

A. Well, at that particular time, you are including the marketing—I mean, his cotton allotment? There isn't anything that I remember.

Q. Well, let me ask you this once again. You appropriated cotton from the Burns farm to supply this 70 odd acres?

A. Yes, I thought I had already testified about that, sir. I am sorry.

Q. That was in 1955, I am talking about.

A. Yes. I was supposed to use the Burns farm again, and it had a 70 and one-half acre allotment.

Q. Did you use it?

A. Let me look at the listing sheet and be sure. That would be Number 2.

Q. First, let me ask you if you are familiar with this Government's Exhibit 2 in evidence.

A. Yes, sir.

Q. Was that used while you were office manager?

(Testimony of Joe L. Short.)

A. Yes, sir. According to these records, I probably didn't do anything more about it.

Q. Was there any disposition of the cotton from Farm 595 for the Burns farm for that year shown there?

A. Farm 595 has a red line through it, and it has a note out here that it is on the Second Correction Supplement, Page 1. [434]

It will take me a minute to find this, sir.

We reduced the allotment on 595 from 70.6 down to 57.9, and it looked like it was later reduced, because there is another red line in it, but it doesn't have any notes out here.

If I have enough time, I will try to find it in here, and try to find out what happened to it after that.

Q. The main question I want answered is, do you know whether or not the Burns cotton allotment on 595 went to Neely in 1955?

A. Not on the listing sheet, as far as I know, sir.

Q. In other words, where did you get the cotton that you gave him?

A. From the County Reserve. Actually, if I needed it, but I never did put it on the listing sheet, sir.

Q. I see. Did Mr. Neely know anything about that particular mechanical entry?

A. No, sir, he would not know anything about it.

Q. Did you ever discuss it with him in any of your conversations at that time? A. No, sir.

Q. Now, in connection with, I think it is 11-B,

(Testimony of Joe L. Short.)

Mr. Short, I am handing you Government's Exhibit 11-B in evidence, which is supposed to be Form 578, for the 1955 Short Staple allotment on Mr. Neely's farm. Am I correct in that statement? [435]

A. That is right.

Q. Are you familiar with that form?

A. Yes, sir.

Q. Now, in connection with that form, did you ever have a conversation with Mr. Neely about that?

A. Yes.

Q. Do you remember when that conversation happened?

A. Well, it was in August, and I think the date was the 18th of August, 1955, at the front counter in the ASC Office in Casa Grande.

Q. Do you know who was present?

A. Well, there were several clerks around there, but they were not in the conversation. I was talking to Mr. Neely.

Q. Now, would you look at that form there and tell me if it is indicated anywhere that at any time there was an overplant on cotton?

A. Yes, sir. In Column D.

Q. And what does that column show as overplant? A. It said he had 426.5 acres.

Q. Now, in connection with that overplant, did you have a conversation with Mr. Short at that time and place? A. With Mr. Neely, you mean?

Q. Yes, I am sorry. A. Yes.

Q. Do you remember what was said? [436]

A. I can tell you the gist of it.

(Testimony of Joe L. Short.)

Q. All right, would you tell it.

A. When Mr. Neely came in on the 18th day of August, he said he needed his marketing cards. So I went and got his farm folder, went and got the marketing cards, not only on Upland, but on long staple cotton, brought them up there to the counter.

I said, "Rex, it looks like you are overplanted."

And he said, "Well, I think they made a mistake in my measurement."

I asked him how much he had, and he said, "I think I planted around 390 acres."

I said, "All right, you have 70 and one-half and 306. That would be around 375. You are about 15 acres overplanted."

Well, Mr. Neely said, "Yes."

I said, "Did you plow that up?"

I don't remember whether he said he plowed it up, or was plowing it up, one way or the other.

But anyway, I said, "I have some other business out in your area, and we will have to remeasure your farm and see whether we made a mistake or not. And it will cost you the regular measuring fee," which was \$10 at that particular time. And he gave me a \$10 bill. I got a receipt. Either I wrote it out or had my secretary write it out, gave [437] him the original, we kept the copy, and after he gave me the \$10, I gave him his marketing cards, because I was pretty sure that he was right.

Q. Do you know that his cotton was subsequently measured? A. Yes, sir.

Q. Do you know who did that?

(Testimony of Joe L. Short.)

A. Yes, sir, I measured it.

Q. Do you remember the circumstances?

A. Yes, sir. At that particular time we had some grain storage loan,— I think I said that wrong.

We had some grains building loans in that area. In other words, we had some loans on some grains storage buildings. I had to go out there and inspect those. It was within five or six miles of Mr. Neely's farm, so I might as well go through there, rather than having two boys who were working on the other side of the town go back out there for one farm so I took the aerial photographs, and went out there.

When I got out to the fields, I checked the aerial photographs. In fact, the rows were running, by the physical characteristics that you could see on the aerial photographs, you saw the lengths of them. There is no trouble about that.

I counted the rows. I have done that before, most fellows who do that once in a while, the way we do that, we count the rows, multiply it by 40 inches, and that gives us the width. We know what the length is. We can scale that off. [438] We can figure how much he actually has in cotton.

At the particular time I was out there, he had plowed some turn rows out, and took out a few bad spots. That is the way it was on his Upland.

On his short staple, he had took out some turn rows, and took a little bit out on the side. I counted the rows on that.

After I counted the rows at that particular time,

(Testimony of Joe L. Short.)

I multiplied it in my head. I didn't put it down on paper.

Anyhow, it looked like he had about 375 acres, or less. So I went on, made the rest of my inspections and come back to the office and run it through the computer, and I was about right. He was within his allotment.

Q. Now, you have seen the statement you signed for the CID men, haven't you, Mr. Short?

A. Yes, sir.

Q. And you remember their testimony,—that was Mr. Johnson here, and Mr. Kennedy.

A. Yes, sir.

Q. In connection with this point?

A. Yes, sir.

Q. Do you recall what you have just stated is the same story that you gave them in the statement?

A. No, sir, it is not in the statement. In other words, when I was talking to them—— [439]

Q. Let me ask you this question. Is it different from what you said in the statement, or is it in addition to what you said in the statement?

A. I will have to explain this, Mr. Stanfield.

When Mr. Neely was testifying yesterday, he mentioned a conversation, and said some stuff that was supposed to have been said during that conversation I have told the C & I boys, and he told most of the people I talked to, that sometimes my memory is not as good as I would like to have it be. Sometimes you can get all of a conversation on

(Testimony of Joe L. Short.)

something like that, and then my memory comes back, this comes back to me.

Before that, I thought that I went out there and found about 55 acres plowed up. That is wrong. But when Mr. Neely was on the stand, it come back to me, and I mentioned it to you at that time, I mentioned it to the C & I boys on the first recess.

Q. Now, did you check the long staple cotton on the same basis? A. Yes.

Q. I hand you Government's Exhibit 11-C in evidence, and ask you isn't that the 578 for the year 1955 on the long staple? A. Yes.

Q. Now, how much overplant does it show?

A. It looks like he was an acre and eight tenths over.

Q. You say you checked that through also?

A. Yes, sir.

Q. And you were satisfied that he was not overplanted?

A. Yes. When I came back into the office and had these checked with the calculator, we could either make out a new 578, or we could show it as destroyed acres. We had a choice whether we would do it one way or the other.

I chose it as plowed up acres.

Q. I believe you stated that you went ahead and had Mr. Neely sign his marketing card?

A. Yes.

Q. And his 578? A. Yes, sir.

Q. And you gave him the marketing cards?

A. Yes, sir, because I knew I could give him the

(Testimony of Joe L. Short.)

marketing cards, and I was going out there either that day or the first thing the next morning, and I could cancel those marketing cards in five seconds by calling his gin and telling him that we are voiding that marketing card.

Q. With respect to the signing of a Form 578—— A. I am sorry. You lost me.

Q. With respect to the signing of a 578 form.

A. Yes.

Q. Where a farm showed an overplant. [441]

A. Yes.

Q. Wasn't it an unusual procedure to go ahead and allow the farmer to sign that?

A. In that county, we usually let them sign them until they had plowed up their overplanted cotton, or say they were going to pay the penalty, but sometimes it did happen.

Q. How often?

A. Oh, probably 20 or 25 times a year.

Q. Is there any particular reason for that?

A. Well, lots of them live a long ways from Casa Grande, what we call windshield farmers.

They live a long ways from Casa Grande, and besides that, we have some others who live partly in Casa Grande, and one of them lives in Virginia. And another time I remember letting somebody sign it because he was going to Hawaii for a vacation.

Q. Now, if there were exceptions of that sort, what about the further step of giving them their marketing card at such time?

A. That would go on their previous record, and

(Testimony of Joe L. Short.)

as far as I was concerned, he had never overplanted, or stuff like that. I could give it to him, if necessary.

Q. You are talking about Mr. Neely?

A. Yes.

Q. How many cases a year were there when you would give [442] the farmer his marketing card, as well as letting him sign his 578 when he was overplanted, if you know?

A. There might be five cases a year.

Q. With respect to the cotton year of 1956, and allotments, do you remember a conversation you had with Mr. Neely regarding what we referred to here as the Burns lease?

A. Yes.

Q. Do you remember where that conversation took place, and when, and who was present?

A. Well, I remember one conversation, and this must have been in oh, probably December in 1955, talking about his 1956 allotments.

The conversation is about, well, the one——

Q. Will you tell us where it happened, and who was present?

A. It was in the ASC Office at Casa Grande, and Mr. Neely and I were there.

Q. Do you know what was said?

A. Well, about the same remarks came up as was in another conversation that I related awhile ago.

Mr. Neely said, "Can I get the Burns farm on this lease for the next year?"

I said, "Yes, but the price is going up. It is \$25 an acre."

(Testimony of Joe L. Short.)

At about that time, why, he took out his check-book [443] or took out a blank check, either one. I don't know whether it was a check, or a book. Anyhow, he gave me a check, and I made up his allotment notice, and gave it to him.

Now, when he gave me the check, he says I have told him that the allotment was about 60 acres, and he said, "Well, that would be about \$1500," after figuring out, or something like that, and he said, "I understand that your wife is going in the hospital before long. I am making this for \$1750. The other \$250 is not to go to Burns, it is for you."

And, of course, I probably thanked him, or something like that, but that's all I remember, sir.

Q. Mr. Short, you haven't fixed the date of that conversation.

A. If you can give me the check, I can tell you the date of it.

Q. I hand you Government's Exhibit 14-C, and ask you if you recognize that.

A. Yes, this is the check that was handed to me during that conversation, and it is dated December 9, 1955.

Q. And there is no reason for you to think that the conversation in which he gave you the check was any date different from this?

A. I don't think so.

Q. Now, what if anything did you do so far as the office [444] records are concerned to acquire this 60 acres of allotment from Mr. Neely, rather, for Mr. Neely, and put it on his farm?

(Testimony of Joe L. Short.)

A. Well, I was thinking about taking it out of the County Reserve, but I never did get to it, sir.

Q. What do you mean, you never did get to it?

A. Well, possibly it slipped my mind, or I was in pretty bad health at that particular time, sir.

Q. You have no recollection of doing anything about it, is that your story?

A. Not that I remember.

Q. I hand you Government's Exhibit 11-E, and Government's Exhibit 19 in evidence, and ask you if you know what those two are?

A. Yes. Number 19 is his original allotment, and it comes from the original listing sheet, and it is the original, so it must have went to him.

Now, Number 11-E, this is a carbon copy of a cotton allotment that H. L. Mathis drew up at my instructions, because the carbon copy that I had for the revised allotment which goes between these two allotments, had got lost from our drawer, and I told him to make it, put the carbon copy in the farm folder, to tear up the original.

Did I make myself clear on that?

Q. You did to me. I hope you did to the jury.

In other words, you did then prepare a revised notice of allotment for Mr. Neely for the year 1956?

A. I prepared one, and ordered another one prepared.

Q. Do you remember when you prepared yours?

A. Probably on December the 9th, 1955.

Q. Do you know what happened to the original?

A. Well, I gave it to Mr. Neely, sir.

(Testimony of Joe L. Short.)

Q. Do you know what happened to the office copy?

A. No, sir. I put it in my desk drawer, and the next time I looked for it, it was not there.

Q. Now, why did you have Mr. Mathis prepare this subsequent revised one?

A. So I would have an office copy.

Q. Do you know what happened to the original of that?

A. He was supposed to tear it up. I don't know, sir.

Q. And the dates on here are December 1st, 1956?

A. That is, it is about that time I told him to do it. In fact, I think it was later than that, and he probably made it around the 10th of December, and dated it back to the first, or something like that.

Q. What was the state of your health, Mr. Short, in 1956?

A. Well, the state of my health in 1956, it begins in 1954 when I developed a duodenal ulcer, I was on a diet for a long time, and then in 1955 it kept getting worse.

The ulcer pretty near cured itself up, but the [446] tension was getting me. In 1956, the doctors told me several times that I would have to quit that job, because it was finally, I was going to have an eruption, or something like that.

In June or July, the doctors told me that I should only work two days a week. I called the clerks together and told them, "I will be here only

(Testimony of Joe L. Short.)

two days a week. Mr. Mathis will be in charge of the office when I'm not here. If he makes a mistake, I will talk to him, and so forth. But anything else, you do it as Mr. Mathis says."

Then the first of August, the doctors told me to take 30 days off, and, if necessary, I might have to take 60 days off, so I went up to Sedona, and stayed up there about nine or ten days, and, well, I just got hemmed in up there, so I come back to the office and started full time work, and on September 8th, I had a stroke.

Q. How did this stroke affect you, Mr. Short?

A. I lost the control of my speech. I was partially paralyzed on my right side.

Q. You say this happened on September 8, 1956?

A. Yes.

Q. Were you in the hospital?

A. I was in the hospital for about a week, and then the doctor said it looks like it's going to be a long process for him to recuperate, so let's let him go home, and told me not [447] to go back to work for some time, for any definite period.

Q. You did once again return to work, eventually, did you not?

A. Yes, sir. First, my wife would let me go in there maybe five minutes, to begin with. Later it was an hour. Then she let me go in there about two hours, and by the middle of October, or first part of October, I could go in there about half a day, but I never did return to full time work.

(Testimony of Joe L. Short.)

Q. You said you did go back on a part-time basis by October or November?

A. I think in October. It might have been the last of October, first part of October. It had to be the last of October. It had to be the last of October, or the first of November, when I was there about four hours a day.

Q. When did you return full time?

A. I never did return to full time work.

Q. And when was your employment terminated?

A. On the 28th day of December, 1956.

Q. Mr. Short, you were pretty much out of the office there for a period of three, perhaps almost four months. Were you paid for that time?

A. Yes, sir, I was paid for it.

Q. Now, you have heard the testimony of the Government agents regarding the many tapes which you made? [448]

A. Yes.

Q. I hand you Defendant's Exhibit J, and ask you if you recall signing this statement?

A. Yes, sir.

Q. Do you remember that I was present there?

A. Yes, sir. In fact, I couldn't read it at that particular time, and I still have trouble reading, so I had it read to me, and I think he read it to me, and then I signed it.

Q. Is your recollection that January 14, 1957, is the date that we signed it?

A. I am sure that is the date.

(Testimony of Joe L. Short.)

Q. They took this statement from a tape that was made in my presence? A. That is right.

Q. Isn't that your understanding, Mr. Short?

A. That is right.

Q. Did you have any additional sessions with these agents?

A. Yes, sir. Quite a few of them.

Q. Do you remember when they took place?

A. I think they started in January, and lasted until March, or something like that. Probably three months. Not every day, but maybe one time a week, sometimes two or three times a week.

Q. How did they make the arrangements for taking these [449] tapes from you?

A. Well, Mr. Kennedy had a tape recorder, and he usually set it up in the office that we were talking in, and when they needed me in there, wanted to talk to me, they usually would call me, and he would come out and get me and take me into the office. I would talk to them, and then he would take me back home.

Q. Do you know if the additional tapes were ever reduced to writing?

A. Not that I know of, sir.

Q. You have a fair recollection of what went on on these additional tapes in the conversations?

A. Yes, pretty well.

Q. Do you recall whether you have had any conversation with agents Kennedy, and perhaps Johnson, regarding the ACP practices of Mr. Neely?

A. Yes.

(Testimony of Joe L. Short.)

Q. Do you remember where that conversation took place?

A. It was in the ASC Office in Casa Grande.

Q. Do you know when, particularly?

A. No, I don't remember the date.

Q. Was it all in one conversation?

A. No, sir. They mentioned it one time, and I think we talked probably an hour or an hour and a half. Later they mentioned it again, maybe two other times. I don't know for [450] sure the other, as I remember, just passing topics.

Q. In particular, did this ACP practice of Mr. Neely's in 1954, do you remember what was said?

A. They showed me some forms from his ACP file, and they asked me if I could identify them.

I said I can tell you what they were, and some of them I might identify, and, well, when they come up with the different forms, they asked me different questions on them.

Q. Did they discuss with you the handling of the ACP of 1954, as to personnel?

A. A very little bit.

Q. Was it brought out in this conversation who had handled ACP in 1953 and 1954, and so on?

A. Well, I don't think there was a question asked me on that, but probably I told them there were other people handling it.

Q. Let me ask you this, Mr. Short. Did you discuss with them a girl that had worked there by the name of Edna Drivens?

(Testimony of Joe L. Short.)

A. I think I mentioned her name, and I told them I had a little bit of trouble with her work.

Q. What did you tell them in connection with her?

A. Well, I think I told them that she started to work in 1954, I think, early. She replaced me on the ACP, and after I became office manager, I checked her every once in a while.

The first time I checked her was on, oh, probably [451] in February or March. At that time she was \$12,000 over her budget, and that didn't set very well with me, so I re-did her first ledger to be sure where she was, and went and talked to the County Committee on it, and they said, Well, she just made a mistake, let's let her go on.

I did let her go on. A few weeks later I checked it again, and she was off again, so I fired her.

Q. Do you remember if you replaced her with anyone?

A. Later, Paul Hanna replaced her, yes.

Q. Now, in various conversations that you had with the Government Agents, we know there was some conversation about the signatures of Doyle Dunkin.

A. Yes, sir.

Q. On some ACP forms? A. Yes.

Q. Do you remember any of that conversation or conversations?

A. Well, in the first conversation that I said lasted an hour, maybe an hour and a half, something like that, they brought out this 247, and they showed it to me, and I said it was a surprise to me. Why

(Testimony of Joe L. Short.)

is Doyle Dunkin's name on there, or is that Doyle Dunkin's name. And they said, "We don't know who signed it."

And I said, "I don't know, I don't know a thing about it." And all during that conversation, as far as I [452] remember, I told him that I didn't sign it. And I still don't know a thing about it.

Q. Did you have a subsequent conversation in that connection?

A. Yes, sir. Maybe it was a week later. It may have been longer, they brought it up again in another conversation. They said, "We have had this checked by a handwriting expert, and they say it is your signature."

I said, "All right, let's take your expert's opinion. Maybe I signed it. Why did I sign it? There is no reason for it. It just doesn't make sense."

Q. Why do you say it doesn't make sense, Mr. Short?

A. Well, in a year's time, I probably signed 300 of those as an office manager, and there is one place that I can sign that is for the authorized representative of the County Committee.

Then it goes to the S.C.S. The S.C.S. had been very cooperative with me. If a certain practice didn't go the way it should have been, I could go in and talk with the S.C.S., and they would give me the report I needed, if it was legitimate and above-board, all right.

Why should I put Doyle Dunkin's name on there, and besides, that doesn't spell his name right, and

(Testimony of Joe L. Short.)

it doesn't have the right middle initials, and I told the investigators that in that particular time why should I put Doyle Dunkin's [453] name on there, because Mr. Neely's farm was not in the Indian Reservation. I would have to have gone to the S.C.S. to get it. In other words, it still doesn't make sense to me.

Q. Do you know Ray Bates? A. Yes, sir.

Q. Who is he, or who was he at that particular time?

A. At that particular time, he was the responsible technician for the S.C.S. Service in Casa Grande. In fact, he covered all of Pinal County.

Q. Did he ever sign papers of that sort?

A. Yes. Sometimes we would get an application, and some way it would get mixed up, and, as I said, it could have gotten mixed up with the girl being bad, or stuff like that, and they wouldn't get the 247's over to the S.C.S.

Later the farmer would come in and say, "I got this all done."

And I would go over and talk to Ray Bates, and I would say, "Ray, we just made a mistake. We didn't get it over here. Can you go out and check it and find out if it is necessary," and then do the performance report, and he never refused me a time.

Q. Where was Mr. Bates' office located at that particular time?

A. Let's see. That was in 1954.

Q. Yes. [454]

(Testimony of Joe L. Short.)

A. We had a hall about three feet wide running through the office, and he was on the other side of this aisle, you might say. In fact, we didn't have full partitions. They were just half partitions. In fact, I could holler from my office, and Ray would hear it.

Q. Did you know Doyle Dunkin?

A. Yes, I knew Doyle very well.

Q. In what connection did you know him?

A. Well, in the ACP program, we were always trying to get some ACP work done on the Indian Reservation, and before he was on the Gila Reservation, he was down on the Papago Reservation. Besides that, I square danced with him.

Q. Mr. Short, I will hand you Government's Exhibits 12-D and 12-E in evidence, and ask you if those are the documents that the CID boys showed you, as far as Dunkin's signature is concerned?

A. Yes, I think they are the same.

Q. Do you know Doyle Dunkin's signature?

A. Yes.

Q. Is that it on that? A. No. No.

Q. Do you have any independent recollection of signing those signatures?

A. No, sir, I don't know a thing about it, sir. As I have said before, some of it looks like my handwriting, but [455] if I signed one of these 247's, I would remember it, and I still don't remember it.

Q. What you are saying is that you do not——

Mr. Holohan: He did not sign it.

Mr. Stanfield: I beg your pardon?

(Testimony of Joe L. Short.)

Mr. Holohan: Never mind.

The Court: Go ahead.

Q. (By Mr. Stanfield): Your statement is you do not remember signing it? A. No.

Q. Now, Mr. Short, do you recall any conversation that you had with Mr. Neely in 1956 in connection with any of the charges that are being tried here today?

A. Yes, sir. I talked to him about the charges. Not—our conversation was not about that.

Q. I want to know when, where, and who was present.

A. Well, there are two conversations that I remember right now. One of them I think was on the 19th day of December.

Q. Where?

A. In the ASC office in Casa Grande.

Q. Who was present?

A. All I remember is Mr. Neely and myself.

Q. What was said?

A. For some reason I had his farm folder out on my desk. I don't remember whether somebody told me that Mr. Neely was [456] in there, or whether I went out and got it when he came in, or what it was, now.

I had it out on my desk, and I said, "Rex, did you plow up your overplanted cotton out there on your farm?"

And his conversation was, "No."

I said, "Rex, you are overplanted. You better go into the State Office and tell them to get measure-

(Testimony of Joe L. Short.)

ment boys out there from the State Office, and pay the penalty."

Q. What did he say, if anything?

A. Well, I don't remember anything that he said. I mean, nothing other than what I was talking about.

Q. There was a later conversation?

A. Yes.

Q. Where did that take place?

A. The next one I think was in Chandler.

Q. Do you remember when it was?

A. No, sir, I don't remember the date. It was after the first one, I am pretty sure of that.

Q. Would it have been in December?

A. Yes, I say after the one that I just testified to.

Q. And who was present?

A. In fact, I was in Chandler for a meeting, and I called Mr. Neely to meet me somewhere, and we met in a cafe, and Mr. Neely and I were the only ones there.

Q. I see. What was said? [457]

A. He asked me had they measured his farm, or something like that. In other words, the conversation started on that point, and I said yes, I thought so, but I didn't know. And he asked me how much the measurement was, and I said I didn't know.

Q. Anything else said, do you remember?

A. That's all I remember right now.

(Testimony of Joe L. Short.)

Q. Do you remember if his allotment notices for 1956 were mentioned?

A. Yes. There was. I asked him to look up his revised copies of his allotment notices, and keep them handy.

Q. Did you tell him why he should keep them handy?

A. There were some investigators. I didn't tell him whether they were from the State Office or whether they were from the CID office, but I told him they were doing some investigating in Pinal County, so look up his allotment notices, and keep them handy.

Q. Did you have a further conversation with Mr. Neely in connection with this?

A. Yes. On the 28th day of December, 1956.

Q. Where?

A. It was in front of my house where I live. I knew that Mr. Neely was coming down there. I don't know whether there was a telephone conversation before that. I imagine there was. I don't know who originated it, or anything else. I knew he [458] was coming down there. I think it was around five o'clock in the afternoon.

Q. What was said during that conversation?

A. Mr. Neely asked me again about the measurements, and I told him I didn't know, because they had never informed me how much measurements they had—how much cotton they had found on his place.

(Testimony of Joe L. Short.)

Then Mr. Neely asked me about the Burns lease, and I told him not to talk to me about the Burns lease, just forget that for right now. There are some investigators in here, and they will probably get in touch with you. And I also told him to hire a counsel, or go talk to a lawyer.

Q. Now, did you have a subsequent conversation with Mr. Neely? A. No, sir.

Q. When was the next time, if any, you talked to him?

A. Other than seeing him here in the courtroom, I haven't talked to him since then, except on the 11th or 12th of this month.

Q. Since this trial started? A. Yes.

Q. Now, in connection with the release and re-apportionment practices in the County, I don't know whether I have asked you or not as to during the years you were in the office there, how many were handled each year? Did I ask you that already? [459] A. Not that I remember.

Mr. Hays: You asked it.

Mr. Stanfield: Mr. Hays said I asked it.

The Witness: I forgot it, then.

Q. (By Mr. Stanfield): During the years you ran the office down there, do you know what the allotment of cotton was for the County?

A. Yes.

Q. What was it?

A. In 1954 it is 165 acres, plus some added extra acres. In 1955 and 1956 it is 138,000 acres.

(Testimony of Joe L. Short.)

Q. Do you know how much was planted and harvested to cotton in those years?

A. Yes. According to the AMS figures, which were prepared from the records in the ASC office, I know for 1954 and 1955.

Q. What were those figures?

A. In 1954, we had about 159,000 acres. In 1955, I think it was about 133 or 4 thousand acres.

Q. In 1956, do you know that figure?

A. No, I don't know that, sir. I wasn't there when they computed that.

Q. Do you know whether the county allotment was exceeded by the planted acreage in any of those years?

A. Say that again. [460]

Q. Do you know whether the plant, the county allotment was exceeded by the planted acreage in any of those three years, harvested acres?

A. The total planted to cotton in that county did not exceed the total allotment for the county, is that what you mean?

Q. Yes. A. No.

The Court: We will recess until two o'clock.

(The noon recess was taken.) [461]

Wednesday, September 17, 1958

Two O'Clock P.M.

The Court: You may continue.

JOE L. SHORT

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Stanfield): Mr. Short, I don't believe I asked you this question before. What was your physical condition during the time in which you gave the government agency these statements in December of 1956, and in the first part of 1957?

A. I had learned to talk again, and I couldn't write and couldn't read.

Q. What about your memory? [462]

A. Well, my memory wasn't as good as it should have been at the time, and it had improved from what it was in September of 1956.

Q. Now, in comparison, what is your condition today?

A. Well, I am better than I was at that time. I still have trouble talking. I still have trouble writing. And I still have trouble reading long documents, and my memory is better, but I am still not normal.

Q. Now, with respect to the Form 578, do you know what the regulations were while you were office manager, what they provided, insofar as when the farmer was to sign them? A. Yes.

Q. What did the regulations provide?

A. The farmer-reporter, or farm measurer, if you want to call him that, goes out to the farm and

(Testimony of Joe L. Short.)

is supposed to contact the operator of the farm, and they go over the fields.

The operator is supposed to give him an estimate on his fields, and then the reporter is supposed to get it signed by the operator.

Q. When? A. At that time.

Q. Was that the usual procedure used in securing that?

A. It was. Because a lot of operators lived off the farms, and if you take the 578's out to the field, they can plot it on a map, and can put the figures down for each field, and [463] then they can't find the operator. So we usually kept them in the office.

Q. Now, referring again to the conversation that went on between you and the government agents, some of which was tape recorded, and some of which was not tape recorded. Do you remember whether or not you had a conversation or conversations regarding the irregularities that might have been in your office there? A. Yes.

Q. Were these conversations had during the periods you have previously mentioned?

A. Yes.

Q. Do you know what was said in that connection?

A. Well, they asked me about any objection that I had to the County Committee's opinions, and I said yes, I objected sometimes on the Committee's opinion, but about the only way I could tell you about it is to bring the Minutes in, and we will go through them, and if I objected, why, I would tell

(Testimony of Joe L. Short.)

you about it, but they never did bring in the Minutes, and never did say much more about that part.

There was some other irregularities that were mentioned. Did you want me to go ahead and tell about them?

Q. Was it in the statement?

A. I beg your pardon?

Q. Is that what you told them? In other words, it was [464] something you said to them?

A. Yes, I told them about it.

Q. You might as well say.

A. Well, we mentioned some names. One of these was the Casa Grande Country Club. Kenneth Julian, and Frank Russell, and Peggy Golston, and, of course, I had already told them about Neely, Simmons, Ladd, and Morris. That's about all I remember right now, sir.

Q. Was there any further conversation regarding these first ones you just now mentioned?

A. Very little. The only one that I remember anything more about was the Casa Grande Country Club. They asked me a few more questions about it.

Q. Do you remember what was primarily discussed at the later conversations—were there particular persons that they were interested in at that time, rather than the ones mentioned?

A. In part of the conversations, they were very particularly interested in John E. Beggs, and Henry Haley, and Rodney Elsberry was mentioned, but not very much.

Q. While you were making the statement to

(Testimony of Joe L. Short.)

them, did you discuss with them your part in this affair?

What I mean is, did you discuss with them your part in the subject which they were investigating?

A. Yes. [465]

Q. What did you tell them, briefly?

A. Well, in other words, I told them that these different things transpired while I was in the office manager's job, and nobody else knew about it except me. And I also told him, if you find something that you want to understand, or want some information about it, bring the files to me. And if you don't bring the files to me, why, I don't know whether I can tell you about it or not.

Q. Did they subsequently do that? A. No.

Q. Now, in this same conversation or conversations, did you discuss with them Mr. Neely's ACP situation in 1954? A. Yes, sir.

Q. Was that with both agents, or just one?

A. I think there was two there, sir.

Q. Where did that happen?

A. That was in the ASC Office in Casa Grande.

Q. Have you any idea when that was?

A. No, sir, I don't know the date.

Q. What was said in that connection?

Mr. Holohan: I object. It has been asked and answered. It is just what we went through before lunchtime, where we showed those documents, and went through that about Doyle Dunkin, and so forth.

The Court: Well, go ahead. [466]

(Testimony of Joe L. Short.)

Mr. Stanfield: I will be glad to withdraw the question as far as the Dunkin episode is concerned.

The Court: All right.

The Witness: Well, they showed me several documents. There was one that was marked Cancelled, and it had a date on it in November, 1953. And then they showed me another application, and I think it bore a date of May, 1954, something like that.

And then they said when he made this application, did you know the work was already done. And I said, "I don't know, I really don't know."

In fact, I was not running the ACP program at that particular time. I said, "If you will give me the whole files, maybe I can help you, but with individual documents, I can't help you."

Q. Did they so provide them in the file?

A. No.

Q. Now, in your statements to the agents, did you discuss with the agents your reasons for what you had done, and disclose to them by virtue of the written statement?

Is that question clear enough to answer?

A. You lost me, Mr. Stanfield.

Q. In other words, did you discuss with the agents what you had done, and eventually made a full disclosure of?

A. Yes. [467]

Q. Did you discuss with them in these statements the reasons for what you had done?

A. I think probably I gave them a reason. I don't know for sure.

(Testimony of Joe L. Short.)

Q. Do you remember what that reason was?

A. Well, yes, sir. I know the reason. As the office manager, I handled lots of transactions that went on in the same way.

In other words, the administrative details were the same. I guess I got carried away and thought I ought to get in on the money.

Q. Let me ask this question. Did you at any time, whether you made an admission in a statement, or otherwise, did you ever have any understanding, or any agreement with Mr. Neely with regard to the conspiracy as charged here?

A. No, sir. No, sir. There was no agreement other than what I have told you today, and what is in my statement so far.

Q. Did you at any time conspire with Mr. Neely to do anything? A. No.

Mr. Stanfield: You may cross examine.

Mr. Whitney: If the Court pleases, in connection with Government's Exhibits 21 and 23 in evidence, 21 is the Deposit Slip of \$1500, dated October 7th, 1954, and the [468] Government Check dated October 6, 1954, covering the 1954 AC Program, there has been some talk here about two checks being issued in 1954, and I finally located in the bank through microfilm a copy of the other check mailed in 1954.

I talked to the United States Attorney about it. He didn't have the original himself, and he agreed to stipulate with me on this matter.

Mr. United States Attorney, will you stipulate

(Testimony of Joe L. Short.)

with me that—pardon me, I better mark these in evidence, both of them, or for identification. This first one, mark it as an exhibit for identification.

The Clerk: Defendant's Exhibits R and S for identification.

(Said Copies of Checks were marked as Defendant's Exhibits R and S for identification.)

Mr. Whitney: Will you stipulate with me, Mr. United States Attorney, that Mr. Neely received payment by Treasury Check April 20th, 1954, for the 1953 ACP Program?

Mr. Hays: We will so stipulate.

Mr. Whitney: And that Mr. Neely deposited in his account pursuant to Defendant's Exhibit S for identification on the 23rd. I don't know what date that is. April 23rd, 1954.

Mr. Hays: Yes.

Mr. Whitney: And we offer in evidence R and S for [469] identification.

Mr. Hays: No objection.

The Court: It may be received.

The Clerk: Defendant's Exhibits R and S in evidence.

(Said Copies of Checks were received in evidence and marked as Defendant's Exhibit R and S.)

Cross Examination

Q. (By Mr. Whitney): Mr. Short, we are going to try to make this as short as possible.

Referring to Government's Exhibit 11-B for iden-

(Testimony of Joe L. Short.)

tification, when was that red writing put on there, with reference to the date August 18th?

A. It either went on there that afternoon, or the next morning after I went out and checked his fields.

Q. I see. That was not on there when Mr. Neely signed it? A. No, sir.

Q. Referring to Government's Exhibit 11-C for identification, also covering the 1955 acreage of Long Staple, you notice those red figures there?

A. Yes, sir.

Q. When were they put on there, with reference to that date, which is the same date, August 18th, 1955? [470]

A. The same answer I gave to the previous question. It was after I went out and checked the fields.

Q. Not at the time that Mr. Neely signed these?

A. No, sir.

Q. Now, with reference to the so-called Burns lease, Government's Exhibit 15 in evidence, did you sign that W. R. Burns? A. Yes, sir.

Q. And what date was that signed?

A. I think it around March the 30th.

Q. Before you got your second check from Mr. Neely for \$1620? A. Yes, sir.

Q. And I notice that you have witnessed the signature of Rex L. Neely? A. Yes.

Q. And you did that at the time Mr. Neely signed the lease? A. That is right.

Q. And the name W. R. Burns was already on there? A. That is right.

(Testimony of Joe L. Short.)

Q. This Lena H. Andrews? A. Andrews.

Q. I notice that she witnessed that also. Whose name did she witness? [471]

A. Both of these names were on here when I took it in to her, and asked her to sign it as a witness.

Q. She, of course, didn't know anything about this, did she know anything about this?

A. No, sir.

Q. About W. R. Burns being signed by you?

A. No, sir.

Q. She just did that because you asked her?

A. That is right.

Q. Mr. Short, I am going to hand you some exhibits that I don't understand.

First, I am going to hand you Defendant's Exhibit G in evidence. What is that?

A. Well, it is an application that the Government share the cost of an Agricultural Conservation Practice for the 1954 year.

Q. And that was signed by Mr. Neely?

A. Yes.

Q. And what is the date of that?

A. November 2nd, 1953.

Q. I notice that the word Cancelled is written across there. A. Yes.

Q. How did that come about?

A. Probably there was another application made at that time. [472]

Q. And she cancelled this one?

A. Now there are some more forms that I would

(Testimony of Joe L. Short.)

like to have in front of me before I say why she cancelled.

Q. All right, I am handing you Government's Exhibit 12-A, 12-B, 12-C, 12-F, 12-G, H, and Government's Exhibit 12 is a folder. See if you can explain those different documents to the Jury. I certainly don't understand them. Referring to them, now, by Exhibit Number, when you do it, please.

A. All right, then. The one that I identified first, and this is Defendant's Exhibit G, he probably made this application on the 2nd of November, 1953. All right, later——

Q. Wait a minute. For what practice?

A. For ditch lining.

Q. For 1954?

A. Yes, sir. He said he was going to——

Q. What date, for 1954 ditch lining?

A. Yes. In other words, at that time we were taking 1954 practices in 1953, but it is under the 1954 program.

Q. Was that allowable under the law and regulations at that time? A. Yes, sir.

Q. What period of time did that run, when you took such applications?

A. The 1954 program I think started the 1st of November, and run until the 31st of December, 1954. That is the 31st [473] of November, 1953, to the 31st of December, 1954.

Q. I see.

A. Do you want me to go ahead?

Q. Go ahead.

(Testimony of Joe L. Short.)

A. After he made this original application, it looks like he come in later in the year, I don't know exactly what time, but there is another application in here.

Q. Did he make this application in front of you, do you remember?

A. At that time I imagine he made it in front of me. There is no way that I can say that for sure.

Q. I see. Very well.

A. The next one is Government's Exhibit 12-A. This is another application for Agricultural Conservation Program money, and it has a date on it which looks like May 24, 1954.

Q. Okay.

A. Now, there are two dates on here. One of them at the bottom of the page, and the other one is probably one inch above it.

Q. I see.

A. Lots of time we would use the bottom date, because that was when the County Committee signed it, and put it on the line above, an inch above there.

Q. Yes.

A. But it looks like he had changed to land leveling, and [474] some ditch lining. Now, of course, he had already applied for one of them, for some ditch lining, and at this time he was applying for some land leveling.

Q. Yes.

A. And there is a note on here that looks like it is in my handwriting.

(Testimony of Joe L. Short.)

Q. What does that say?

A. It says, "Request for Change of Approval from First to Second Practice." And it has the date on it, 5/27/54.

Now, what it looks like to me on these records, he come in, made the application for the ditch lining. I says, all right. Later he got to thinking about it, and he says, "Well, I think I will level a quarter of a section of land out there." I do know from the S.C.S., I knew his land leveling would not go through, and I think I told him, he may have been told before, I don't know, about that.

Q. Why wouldn't it go through?

A. I think the question at that time was Mr. Neely eye-balled that land leveling instead of doing it by an instrument.

Q. What do you mean "eyeballed" it?

A. An instrument makes a straight line. Sometimes you can get down on the ground and eyeball it in, and kind of fill up the hollows, and the S.C.S. wouldn't approve it. It had to be done by instrument.

Q. He didn't get paid for it? [475]

A. No, because the S.C.S. turned it down. When he come in, anyhow, at this particular time, I said, "Mr. Neely, that land leveling is not approved. What are you going to do now?"

He said, Well, I would like to go back to the ditch lining.

I said, "All right, you made an original application for the ditch lining." So I either called the

(Testimony of Joe L. Short.)

ACP clerk up, or went back to see the ACP clerk.

Q. In the same office?

A. Yes, and probably took Mr. Neely with me. At that time I wrote a note, and I didn't sign a new application.

Q. I see.

A. And I probably said, "Reinstate the first application," or, "If you can't find that one use this one."

Because I know he had an application in here. It is proved in our control ledger.

Q. Very well. Now, what is the next deal down on that?

A. Well, this is Defendant's Exhibit H. This is a form that goes out. It is made in manifold sets. There are five of them. The original goes to the operator, and this has the date on it of November 5, 1953, and it concerns concrete ditch lining.

Q. Did it concern this deal here, Defendant's Exhibit G?

A. Yes, sir.

Q. The cancelled document? [476]

A. Yes, sir. And this, I imagine the other ones are in the file, I haven't checked them out to be sure, but there should be three more in that file.

Q. See if you can locate them.

A. There are four more of them in here, sir.

Q. Very well, pick the first one. That is out of Government's Exhibit 12?

A. Yes. Now, may I explain how these four, what happens to them?

Q. That's what I would like to know.

(Testimony of Joe L. Short.)

A. Okay. When you make up a 247, there are actually five copies, original and four carbon copies. The five copies are distributed this way.

The original goes to the operator, as I said before. Three copies go to the S.C.S. One copy stays in our files in the ACP office.

All right, after the three copies get to the S.C.S., the first thing they have to do is sign a statement of need.

Now, it looks like—there is some unusual papers on here and I really don't know exactly what they are. I think I know.

Q. Did you make them out?

A. No, I didn't make them out.

Q. Do you know anything about them?

A. No. This particular copy has, it looks like Ray Bates' signature in two places, and he was the County representative [477] for the S.C.S. at that particular time, and he said on the bottom one, "Full amount not put in."

Q. That is November 5, 1953? A. Yes.

Q. For the 1954 practice?

A. Yes, that was 1954.

Here is a Performance Report.

Q. Unless you know about it, don't testify to it.

A. This Performance Report we used in 1953. I know that the S.C.S. used it, but we didn't use it. And here is a regular business statement that we didn't use, but we had to have that when our application, rather, we had to have that with our appli-

(Testimony of Joe L. Short.)

ation before we sent in our application for payment.

Q. That belongs in this folder, does it?

A. Yes.

Now, here is the other three copies. On two of them it said, "Paid under the 1952 ACP, Cancelled."

And it looks like it has got Ray Bates' signature on it. But the note in here is not in his handwriting. I didn't look on the backs of these, and I should have. Here is one that has got a chart on the back of it.

Q. Take a look at this other one.

A. This one?

Q. Yes.

A. Yes, the chart is the same on the back. The Government [478] forms don't give us a way that we can check where a ditch is in a certain section, so we usually do a section off on there, and there is two of them gone off on here.

Q. What does that say to you?

A. It looks like—(indicating on document.)

Q. You refer now to the blackboard?

A. Yes. Let us call this Section 13. It looks like the ditches were checked for this ditch, and this ditch. (Indicating on diagram.)

Q. That is for this mile and this half?

A. Yes.

Q. For what year?

A. This is on the 1954 form, sir.

Q. All right.

A. All right, now, at that time I knew he had

(Testimony of Joe L. Short.)

some ditches out there. In other words, that is why I said, when Mr. Neely came in, and he said, "I am going to put in some more ditch," I thought he was talking about the ditch from "A" to "B".

Q. He had that in already?

A. Not the first time I talked to him about it in November, 1953, he didn't have it in there, as far as I know, but probably in May, he already had it in.

Q. This was a 1954 practice? A. Sir?

Q. This was a 1954 practice?

A. He was trying to find out if it could come under the 1954 practice, and I said, "Reinstate the original application, that way he will be eligible, but we will probably have to explain it to the S.C.S."

Q. All right.

A. Now, this one with no notes on it was probably our file copy.

Q. Now, Mr. Short, referring to Government's Exhibit 12-G, does that mean anything to you? Do you know who drew it, 12-G for identification?

A. No, sir. I don't know who drew it. By looking at it I can get some ideas.

Q. What does it tell you?

A. Well, it has the same chart on it that we see on the blackboard.

Q. Now, referring to Government's Exhibit 12-F in evidence, which is related to ditch lining, which is dated apparently September 27, 1954, and admittedly signed by Mr. Neely, "Approved Practice and

(Testimony of Joe L. Short.)

Application for Payment for 1954 Agricultural Conservation Program". A. Yes.

Q. Now, as I understand it, at the time that was signed the work had been performed between the dates of January and March, 1954? [480]

A. Yes. That could happen.

Q. How does it come about the Government is claiming that this was signed after the work was done, or should have been signed before? What do you say about that?

A. Well, you have two applications in there, sir. One of them was signed before the work was done. One of them was signed after the work was done. If you remember, I told you that I said to reinstate the original application. I don't think that one was ever reinstated.

Q. Whose fault was that?

A. Well, it was my ACP clerk, sir.

Q. It was not Mr. Neely's fault, was it?

A. No, sir, no, sir.

Q. Now, I want to ask you with reference to this, that P.B.H., 9/25/54, in ink there.

A. Yes, sir.

Q. What does that mean?

A. The person who finally finished this up, an application for payment. Now, this is a different application. After the work has been done, then you have to put in an application for payment. Who finally finishes it up has to sign it with his initials, and the date that he did it.

Q. Yes, sir.

(Testimony of Joe L. Short.)

A. And this means that Paul B. Hanna did this application, and he put the date on it, 9/25/54. [481]

Q. Did you give that to Mr. Neely to sign?

A. I think so, sir.

Q. Referring to the last paragraph there in red printing, where you see Yes or No, the word "No" typed in, Yes or No and the word "No" typed in.

A. Yes.

Q. Was that typed on there at the time Mr. Neely signed it?

A. The questions were not answered at that time, sir.

Q. When were they put on?

A. Probably when Mr. Hanna got this application back on his desk, he said, "The questions are not answered," and that happens lots of times at that particular time of year.

I said, "I don't think he farms any other farm in any other county," and so he put two Noes on there, sir. That was my fault, if you want to say it that way.

Q. Mr. Neely had nothing to do with those Noes on there?

A. No, sir. In fact, if I may elucidate a little bit. I didn't know until the first part of 1956 that Mr. Neely was farming a farm in Maricopa County.

Q. Had you known that, you wouldn't have signed that application?

A. No, sir. This would have been Yes, and I would have figured out what happened in Maricopa County.

(Testimony of Joe L. Short.)

Q. Do you have any idea about Mr. Neely's familiarity [482] with the Government laws and regulations referring to agriculture?

A. Well, I talked to a lot of people, and lots of them——

Mr. Hays: I move to strike the answer as not responsive.

The Court: Yes, it may be.

Mr. Hays: I object to the question as calling for a conclusion of the witness.

The Court: Yes, sustained.

Q. (By Mr. Whitney): In other words, you don't know anything about Mr. Neely's familiarity?

A. Well, it would be——

The Court: You don't have to answer it.

Q. (By Mr. Whitney): Now, Mr. Short, was there anything wrong with signing up for that payment in September, 1954, for work that had been performed in between January and March, 1954?

A. There were lots of them who did the same thing. They made an original application, changed it, and then changed back to their original application, and they got the money, sir.

Q. Were there some farmers transacting business through your office who performed the work before they made any application at all, and then came in and told what was done?

A. Yes, sir, if they told me that, I would tell them, "You [483] are just too late. We can't get you in the ACP, because you have to sign the application before you can get any money."

(Testimony of Joe L. Short.)

Q. You don't know of any that were paid?

A. Not that I remember.

Q. Not while you were there?

A. Not that I remember, sir.

Q. Now, in the years of 1954, 1955, and 1956—this is a general question—when these three checks were issued to you, the first for \$1620, the second for \$1410, and the third for \$1750, you led Mr. Neely to believe, didn't you, that there was a Burns farm?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. And he relied upon your representation, as far as you know?

A. I thought so, sir.

Q. And you remember when he gave you a check dated March 20, 1954, for \$1620, or you ran the check through, and the payment was stopped?

A. At that time, I didn't know it was stopped. It was told to me that it was insufficient funds, or something like that, but the check come back, yes, sir.

Q. The check was finally stopped, and you finally got it back? [484]

A. Yes.

Q. After you got that check back, didn't Mr. Neely ask you for a lease, to get a lease for this Burns farm?

A. There was some talk about a lease, and I told him I could get the leases for him, yes, sir.

Q. And you did get the lease, that is, you purported to get the lease?

A. That is right, sir.

Q. And you told Mr. Neely that it was a lease

(Testimony of Joe L. Short.)

signed by Mr. Burns? A. That is right.

Q. And at that time when you delivered the lease on April 5th, 1954, he gave you a new check for \$1620? A. Yes, sir.

Q. Which went through? A. Yes, sir.

Q. And you got the money? A. Yes, sir.

Q. Now, referring to this first check here that the payment was stopped on, Defendant's Exhibit M in evidence, that, of course, is your signature on the back of that check? A. Yes, sir.

Q. And I notice it says, "For Deposit Only, Joe Short Business Account." A. That is right.

Q. How many accounts did you have?

A. At that time I had only one account. I was thinking about starting another one, but I never did do it.

Q. Wouldn't you think that that would lead Mr. Neely to believe that that was in your business account, before he gave you the second check, and that that money went to Burns?

Mr. Hays: I object, your Honor.

The Court: Oh, yes, sustained.

Q. (By Mr. Whitney): Now, Mr. Wolf, he knew—Mr. Wolf of the State Office knew about this Farm 595, didn't he?

A. Yes, he was in the State Office later.

Q. How long did he know about it?

A. Oh, from February or March, 1954, until now.

Q. And you told him that he better leave it on the records? A. Yes, sir.

(Testimony of Joe L. Short.)

Q. For what purpose did you tell him that?

A. I think I explained that awhile ago. You want me to re-explain it, sir?

Q. No, that will be enough, if you explained it awhile ago.

Now, Mr. Neely at no time during the years 1954, 1955, and 1956 knew that he was operating under a fake lease, or under a fake allotment, isn't that right?

A. Not that I know of, sir. He thought it was all all right.

Q. In other words, you led him to believe that?

A. Yes, sir.

Q. And he inquired of you each time about the Burns allotment, or the Burns lease?

A. Yes, sir.

Q. Subsequent to the time he got the one in 1954?

A. That is right, sir.

Q. Now, Mr. Short, you made a statement to the Government which is dated Eloy, Arizona, January 14, 1957, in evidence here? A. Yes.

Q. And you now stay with that statement?

A. I changed one part of that statement, sir. That was on the 578, and I don't know whether it is in that statement, or later conversations.

At that time I thought he plowed up 55 acres. I have found out since then that he only plowed up 15 acres, and it comes back into my memory.

Q. But you thought after you had looked at his farm, after he gave you the \$10 measurement fee, that he was in compliance? A. Oh, yes, yes.

(Testimony of Joe L. Short.)

Q. And he thought so?

A. I think so, sir.

Q. Now, Mr. Short, of course I remember that, I know that you can't remember every dollar and cents. In this statement, among other things, you said that during each of the three [487] crop seasons mentioned above, "I accepted money from cotton producers in exchange for obtaining additional cotton allotments for them. I led these producers to believe that I obtained such allotments either from my own farm, or through a deal with other producers who had allotments which were unplanted. They trusted me, and, as far as I know, they believed my representations."

Now, then, you say the names of the producers. I am only interested in Mr. Neely. I haven't any business with any of the others.

A. Yes, sir.

Q. "The names of the producers and the amounts they paid are as follows: Rex Neely paid me \$1800."

You mean \$1,520, didn't you?

A. At that particular time I didn't have any checks in front of me. I gave them a figure, and until they got the checks, we didn't know exactly how much.

Q. The second one was for \$1,600, and the third one was \$1,750, is that correct?

A. Yes, sir.

Q. Did Mr. Neely ever give you a nickel in cash, other than as represented by these checks, except the \$10 measurement fee?

A. No, sir.

Q. Now, Mr. Short, the Government charges you in Counts VII, [488] VIII, IX, X, and XI with

(Testimony of Joe L. Short.)

making false entries in certain books, concerning, apparently, Mr. Neely's farm.

Did Mr. Neely know anything about that?

A. No, sir, not that I knew of.

Q. Did he ever see the books, that you know of?

A. Not that I know of, sir.

Q. Did he have anything to do with those books?

A. No, sir.

Q. As far as you know, did he ever make an entry in those books?

A. Not other than his signature on certain documents.

Q. You mean on those documents introduced in evidence? A. Yes.

Q. I am talking about the official listing sheets.

A. No, sir.

Q. Did he ever make any entries, or know anything about any fictitious entry made by you, if it was made, on the release and reapportionment supplement sheets? A. No, sir.

Q. Did he know anything about making a fictitious entry charged to you on the Revised Notice of Allotment for Farm 647, for the 1954 crop, a record made in connection with your duties, by indicating thereon 400.8 acres? Did he know anything about that?

A. That is a very long sentence, sir, and I forget the [489] first part of it, but let me say it this way. He didn't know anything about the 400.8, except that I told him that was his allotment, and gave it to him.

(Testimony of Joe L. Short.)

Q. And you sent him up an allotment notice to that effect? A. Yes, sir, gave it to him.

Q. Signed by some member of the Committee?

A. That is right.

Q. He didn't aid, abet, and induce you to do that, did he? A. No, sir.

Q. On the August 18, 1955, you are charged with making a false and fictitious entry as to Form 647, that is Neely's farm, on Form 578, of the Pinal County Agricultural Stabilization and Conservation Committee office for the 1955 crop year, by indicating thereon 120.4 acres of cotton destroyed.

I believe you state that you put those red figures on there after the thing was made up by Neely?

A. Yes, sir.

Q. Neely didn't aid, abet, or encourage you to do that, did he? A. No, sir.

Q. Count XI, on the same date you are charged with making a false and fictitious entry as to Farm 647, Neely's farm, long staple cotton on Form 578, 1955 cotton crop year by indicating thereon 1.8 acres, knowing the entry to be false. [490]

Did Mr. Neely have anything to do with that?

A. No, sir.

Q. Did he aid, abet, or induce you to do it?

A. No, sir.

Q. Now, did you, Mr. Short, have any understanding or agreement with Neely, express or implied, to form a conspiracy to defraud the United States? A. No, sir.

A. At no time? A. Not at any time, sir.

(Testimony of Joe L. Short.)

Q. I believe you testified that Neely did not know anything about the Dunkin matter at all?

A. That's right, sir. I testified to that.

Q. You heard Mr. Neely testify that he didn't even know Dunkin?

A. Well, that might be so, sir.

Q. Now, you met Mr. Neely at first on the 19th of December, 1956? A. Yes.

Q. And do you remember the conversation you had with him at that time, what it related to?

A. Well, I think we have already gone over this once, but if you want me to, I will go over it again.

Mr. Whitney: All right, we will pass that. I think that is all. [491]

Cross Examination

Q. (By Mr. Hays): Mr. Short, you have gone over the indictment previously, haven't you? You have read it over?

A. Yes, sir. It has either been read to me, or I have read it.

Q. You did accept a check from Mr. Neely in the amount of \$1,620 for cotton allotment, is that correct? A. Yes, sir.

Q. And you did accept another check in the amount of \$1,410 for cotton allotment for 1955?

A. Yes, sir.

Q. And you accepted another check for \$1,750 from Mr. Neely for cotton allotment?

A. That is right.

Q. For the year 1956? A. Yes.

(Testimony of Joe L. Short.)

Q. Those checks were deposited in your account, is that correct? A. That is right.

Q. You made use of those moneys yourself to pay off obligations and to drawn on?

A. Yes, sir.

Q. Did you have any sort of agreement or arrangement with the County Committee whereby you were authorized to receive [492] moneys for cotton allotment? A. No, sir.

Q. Now, in the years mentioned in the indictment, it has been alleged that you made certain false entries in the records, specifically, that you made a false and fictitious entry on the official Listing Sheets of the Pinal County Office for the 1954 crop year, by indicating thereon 400.8 acres of cotton allotment acreage apportioned to Farm 647, well knowing the entry to be false.

Now, did you do that? A. Yes, sir, I did it.

Q. And with regard to the acreage allotment release by Farm 595, did you make that false entry?

A. Yes, sir. I will have to say on that answer, sir, I am pretty sure that I have signed the MQ-29(a), and that is where your release comes from, and I signed it, sir.

Q. Well, you know these other false entries which are alleged in the indictment. Did you make those entries as alleged?

A. Where I have testified that I did so, yes, sir.

Q. Let us get into your specific testimony.

The Court: We will have our afternoon recess.

(The afternoon recess was taken.)

(Testimony of Joe L. Short.)

The Court: You may continue.

Mr. Hays: I would like to have that marked for [493] identification, whatever the Government's next number is.

The Clerk: Government's Exhibit 26 for identification.

(Said Field Sheet was marked as Government's Exhibit 26 for identification.)

Q. (By Mr. Hays): Mr. Short, I hand you Government's Exhibit 26 for identification, and see if we can't explain this ACP a little more.

Have you seen that before?

A. Yes, sir, I have seen it.

Q. And what is it?

A. This is a 1953 Supervisor's Field Sheet.

Q. And by whom is it signed?

A. It is signed by me.

Q. Look at the writing. Was it prepared by you? A. Yes, sir.

Q. The handwriting. A. Yes, sir.

Q. And what is it for?

A. For some ditch. It looks like it might have been about a mile and a half of ditch.

Q. A mile and a half of ditch? A. Yes.

Q. And I call your attention to a figure right here. A. Yes. [494]

Q. Keep that in mind, if you will, please.

A. All right.

Mr. Hays: Mark that as Government's Exhibit 27 for identification, please.

(Testimony of Joe L. Short.)

The Clerk: Government's Exhibit 27 for identification.

(Said Application for Payment was marked as Government's Exhibit 27 for identification.)

Q. (By Mr. Hays): I will hand you Government's Exhibit 26 again. That pertains to the Farm 447, the farm of Rex L. Neely, doesn't it?

A. That is correct.

Q. All right, I will now hand you Government's Exhibit 27 for identification, and ask you to examine that series of documents.

A. Yes, sir.

Q. During 1953, or on 1953 ACP practices, Mr. Short, who did the inspection?

A. I did part of them, sir.

Q. The inspections were not turned over to Mr. Bates to do on that program, is that correct?

A. Not in 1953, no, sir.

Q. Not in 1953. They were handled by the ASC Office, or yourself?

A. Yes. [495]

Q. As clerk?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And on those practices, you were doing the inspection, rather than Mr. Bates, is that right?

A. That is right.

Q. Now, you have examined that document.

Can you find any relationship between the two exhibits that I have handed you?

A. Yes, sir. As I said before, this is a Supervisor's Field Sheet for the 1953 ACP, and this is an application for ditch lining, and this is the No-

(Testimony of Joe L. Short.)

tice of Approval, and this is a carbon copy of his application for payment.

Q. And they involve the same practice, apparently, don't they? A. Yes, sir.

Q. Calling your attention to that same figure again. A. Yes, sir.

Q. They involve the same practice?

A. That is right.

Mr. Hays: Just hold on to those exhibits, if you will.

Will you mark that for identification.

The Clerk: Government's Exhibit 28 for [496] identification.

(Said Application for Payment was marked as Government's Exhibit 28 for identification.)

Q. (By Mr. Hays): Mr. Short, I hand you Government's Exhibit 28 for identification, and ask you to examine that as well. What is that? Or, in fact, I should say what are those documents, because there are about three sheets there.

A. This is a Form ACP-245, which is an application, an application for payment, and these are carbon copies.

Q. And for what application for payment, for what?

A. The farm number is what is the name, Mr. Hays.

Q. Payment for ACP practices?

A. Yes, sir, payment for ACP practices.

Q. For what year? A. For 1954.

(Testimony of Joe L. Short.)

Q. Do you find any similarity in those documents? A. Yes, sir.

Q. All right, what do you note there?

A. I note that the Extent Performed is the same as the one performed in 1953.

Q. And that appears to be for the same practice again, is that right? A. Yes, sir. Yes, sir.

Mr. Hays: Will you mark this.

The Clerk: Government's Exhibit 29 for [497] identification.

(Said Document was marked as Government's Exhibit 29 for identification.)

Q. (By Mr. Hays): I and you Government's Exhibit 29 for identification. A. Yes.

Q. What is that?

A. Well, this was taken out of number 12, I think, sir.

Q. Out of the folder over there? A. Yes.

Q. Go ahead.

A. This is a 247 for 1954 on concrete ditch lining, and it has some charts drawn on the back.

Mr. Whitney: Has some what on the back?

The Witness: Some charts.

Q. (By Mr. Hays): And it is an application for ACP for what year? A. For 1954.

Q. And is there any similarity in figures again, those figures? A. Yes, sir.

Q. I call your attention to——

A. The same figures in it, 237.4.

Q. Ostensibly, it covers the same ditch?

A. I would think so. Yes, sir, yes, sir. [498]

(Testimony of Joe L. Short.)

Q. All of these exhibits I have shown you apply to Farm 647, is that correct? A. Yes, sir.

Mr. Hays: At this time we will offer in evidence Government's Exhibits 26, 27, 28, and 29.

Mr. Whitney: I would like to ask a question on voir dire, referring to Exhibit 29.

The Court: All right.

Q. (By Mr. Whitney): Referring to Exhibit 29, what does that mean, where I notice the word "Cancel"?

A. It looks like they found out that this has been paid for the year before, and cancelled it. There is a note above that that says it is paid for under the 1952 ACP. I think that should have been 1953 ACP, and they cancelled it.

Q. They cancelled it? A. Yes.

Q. How about 27?

A. What were you talking about, sir?

Q. That seems to be work that was applied for under January 15, 1953, signed by Ray F. Wolfe for the County Committee. A. Yes, sir.

Q. And what years does that apply to?

A. 1953 ACP. [499]

Q. Was there anything indicating there that that was paid, or not?

A. I only have these other documents to prove that it has been paid. There are entries on the documents that said it was paid.

Mr. Whitney: No objection, Mr. Hays.

Mr. Stanfield: I have no objection.

The Court: They may be received.

(Testimony of Joe L. Short.)

The Clerk: Government's Exhibits 26, 27, 28, and 29 in evidence.

(Said Documents were received in evidence and marked as Government's Exhibits 26, 27, 28, and 29 respectively.)

Q. (By Mr. Hays): Now, Mr. Short, the regulations in 1954, 1955, and 1956 required an operator to be in compliance before the marketing cards were issued, didn't it?

A. Probably the regulations say that, sir.

Q. Regarding 1955, on your trip out to the Neely farm, after the issuance of the marketing cards, is it your testimony that you, with your eye, counting the rows, could more accurately measure 400 acres than the measuring crews who had previously been out there with tape and instruments to measure?

A. Well, I have seen those measuring crews make some pretty bad mistakes, and since I counted the rows, and the most the rows would be, would be 40 inches apart, I still [500] think I was right, sir.

Q. Is that the approved method, or was that the approved method of measuring rows for office purposes in the County Office in 1955?

A. In 1955. I will have to think a minute. I think in that year we used a deal——

Q. You mean a measuring wheel?

A. Yes. But, sir, on that measuring wheel, I can make it come off a hundred, or a thousand yards in a mile, or make it come under in a mile. I would rather count the rows than to use that wheel.

Q. Well, was counting the rows the method ap-

(Testimony of Joe L. Short.)

proved by the County Office at that time, that is my question?

A. No, sir, I was about the only one that counted the rows.

Q. You were about the only one that counted the rows? A. Yes, sir.

Q. And if that is an accurate method of determining the amount of cotton acreage, then there is no reason why any farmer couldn't come very close to his cotton acreage planted by using your system, is there?

A. If he uses the same formula that I used, I think he would come pretty close.

Q. With regard to the forms 578 in 1955, I will show them to you, if you wish.

A. I would like to see them, sir. [501]

Q. The ones with the red markings on them.

Here we are. I will refer you to Government's Exhibit 11-C and 11-B. Specifically with regard to the one that refers, now, to Short Staple Cotton.

A. Yes, sir.

Q. Which is Government's Exhibit 11-B.

A. Yes, sir.

Q. When you placed those red figures on there, your testimony is that you did, is that correct?

A. Yes, sir.

Q. When you placed those red figures on there, you showed sufficient destruction?

A. Yes, sir.

Q. To bring that farm down to the original allotment shown on the listing sheet?

(Testimony of Joe L. Short.)

A. That is right, sir.

Q. To show the farm in compliance, without regard to any allotment that had been given?

A. That is right, sir. I had done that before on other farms.

Q. I am not asking you about other farms. I just want to know about this one.

And according to your measurements, there were actually only 15 acres destroyed?

A. Yes, sir. Around 15 to 16 acres. [502]

Q. We won't quibble over an acre. 15 to 20, if you wish.

A. No, sir.

Q. I recall your testimony with regard to 1956. You thought of taking Mr. Neely's extra allotment, whatever we want to call it, out of the County Reserve, but never got around to changing the records?

A. That is right, sir.

Q. Isn't it a fact that in 1956, the reserve was a little overdrawn, and you had some problem of getting the Reserve in balance?

A. Not that I remember, sir. Up until the June or July when I started this work, working two days a week, there was still some reserve.

Q. What about the situation in 1955? Did you have any problem on reserve there?

A. Yes. I think that is right, sir.

Q. Is it your testimony now that you did not sign Doyle Dunkin's name, or that you don't remember signing it?

A. Sir, just as I have said it before, that paper is still a mystery to me. I don't remember signing it.

(Testimony of Joe L. Short.)

As I said here before, it looks like it could have been part of my handwriting, or something like that, but I don't remember signing it, and since it is an original document, and the only one that I ever saw that looked like it might have my handwriting on it, I think I would remember it. [503]

Q. But your testimony is you don't remember signing it? A. That is right.

Q. You do not positively state that it is not something that you have signed?

A. Sir, I would have to say just like I did before. It mystifies me.

Q. You stated that one reason for believing that was not your signature was because you had no reason to sign it, is that correct?

A. That is right.

Q. Had any of the other recipients of ACP funds paid you any money for allotments?

A. Sir?

Q. Had any other recipients of ACP funds paid you money for allotments?

A. No, sir, not that I—No.

Q. Don't you think you might have felt a little more kindly toward Mr. Neely for having paid you that year something over a thousand dollars?

A. No, sir. Because Mr. Neely only come in the office about four or five times a year that I would actually talk to him, and there are lots of people who come in there nearly every day, and, in fact, I just knew Neely, and that's about it.

Q. He is the only ACP recipient that had paid

(Testimony of Joe L. Short.)

you any money [504] for allotment, though, isn't he?
A. What?

Q. He is the only ACP recipient that had paid you money for allotment, though, isn't he?

A. I think that is right, sir. You kind of got me lost in that question.

Q. Now, with reference to ACP again, you stated that you had a very amicable relationship with Mr. Bates of the ACP program?

A. Yes, sir.

Q. And if you went over to Mr. Bates and said, 'Mr. Bates, there has been a little clerical error, or some delays here that are penalizing a farmer——'

A. Yes, sir.

Q. He would go ahead and approve things?

A. If it looks like it was all right, and he did it on his own accord, he never did turn me down, no, sir.

Q. I would like to ask you about one statement in your testimony, Mr. Short.

You said something in discussing how the total amount of allotment was secured from Mr. Neely, you said something about taking 73.1 acres from the Plummy farm, or Farm 595, and that you got 7 acres that had been entrusted to you.

Did you have an acreage trust fund, or something [505] that you could just take it out of, or what is the situation?

A. In 1954, sir, there was no water in the project area in that county. Lots of farmers would come in and tell me, "I have some cotton acreage out here

(Testimony of Joe L. Short.)

that I can't plant, because I can't get the water. If you can do anything for me, I will sign a release, see if you can protect my history."

Lots of that went into the County Committee Reserve Fund, or if they ran out of reserve, they could use the release.

Q. What farm or farmer did that 7 acres come from?

A. That would be hard to say. I really don't know.

Q. You wouldn't be able to find out right now, would you?

A. I don't know any records that would prove what I would say, and I really don't know the answer to it, sir.

Q. Really, you just took it out of the air, now, didn't you? A. No, sir.

Mr. Hays: No further questions.

Further Cross Examination

Q. (By Mr. Whitney): Mr. Short, getting back to this ACP practice, isn't it a fact that Neely constructed a cement ditch one and a half miles in 1953, under a 1953 practice? A. Yes. [506]

Q. Is that right?

A. That's what I read off the document, sir, and I approved it, so I am sure I checked it, yes, sir.

Q. And he got paid for it in 1954?

A. That's right.

(Testimony of Joe L. Short.)

Q. By the check that I introduced in evidence awhile ago?

A. Well, I didn't see the check, but you said it was for the 1953 practice, sir.

Q. This Treasurer's Check dated April 20, 1954, for 1953 ACP program (handing to witness)?

A. Yes, sir, it says 1953 ACP Program, yes, sir.

Q. Okay. Now, Mr. Short, isn't it a fact that Neely constructed a cement ditch A to B?

A. That is——

Q. Wait a minute. In 1954, under the 1954 practice? A. Yes, sir, I think so.

Q. And he got paid for that, for a 1954 ACP program or practice?

A. Yes, sir, with this check.

Q. Is there anything wrong in getting paid for a 1953 practice actually constructed in 1953?

A. Under what program?

Q. Under a 1953 program?

A. No, there is nothing wrong with it.

Q. And even if it is paid for in 1954, there is nothing [507] wrong with it?

A. Only if it was within certain dates.

Q. How about this date, referring to Defendant's Exhibit R in evidence?

Mr. Holohan: I object to pursuing that. It is a matter of law, and we have never raised any issue about the 1953 ACP practice.

Mr. Whitney: You may admit that is correct, then?

Mr. Holohan: That is correct.

(Testimony of Joe L. Short.)

Mr. Whitney: All legal?

Mr. Holohan: All legal, a check for April.

The Court: All right.

Mr. Holohan: So we will just save time on it.

Mr. Whitney: Thank you. That is all.

Redirect Examination

Q. (By Mr. Stanfield): One more question, Mr. Short.

I believe on direct examination, that you stated that you had told the, or probably told the agents that you involved yourself in this predicament, and you referred to easy money, I believe.

Could you explain what you meant by that?

A. Well, in other words, the Case Grande Country Club [508] was selling their allotment at an auction, and there were other farmers who were selling their allotment for money.

I was doing this sort of stuff all the time. And since we had some extra acres, I thought I ought to capitalize on it.

Mr. Stanfield: I see. That is all.

Mr. Hays: No further questions.

Mr. Stanfield: That is all I have at this time.

Mr. Whitney: No further questions, Mr. Short.

(Witness excused.)

Mr. Whitney: The Defendant Neely rests.

Mr. Stanfield: We rest.

Mr. Holohan: We have a little rebuttal, your Honor.

The Court: All right.

Mr. Holohan: I call Mr. Parsons, please.

WALTER E. PARSONS

called as a witness in behalf of the Government, for rebuttal, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Holohan): Would you state your name, please? A. Walter E. Parsons.

Q. Would you hand me those documents that you brought [509] with you?

A. Yes. (Handing to counsel.)

Q. By whom are you employed?

A. Soil Conservation Service, an agency of the United States Department of Agriculture.

Q. And what is your job?

A. Well, I am a conservationist for the Casa Grande Work Unit, Casa Grande, Arizona.

Q. In your job down there at Casa Grande, do you have custody of the records of that office?

A. Yes, sir, the records for Casa Grande Work Unit.

Mr. Holohan: May these be marked as documents for identification, each one separately, please.

Q. (By Mr. Holohan): When did you take over your job down in Casa Grande?

A. July 29th, 1958. That could be a day or two either way. It was in July, 1958.

Q. I will hand you what has been marked Government's Exhibit 30 for identification. Is that one of the records of your office? A. Yes, sir.

(Testimony of Walter E. Parsons.)

Q. Is that kept in the regular course of governmental business?

A. Yes, sir. This is kept in the file with ACP Referrals that we handle for ASC Office. [510]

Q. It is one that is required to be kept in the regular course of your governmental business?

A. Yes, sir.

The Clerk: Government's Exhibits 30, 31, and 32 for identification.

(Said Documents were marked as Government's Exhibits 30, 31 and 32 for identification.)

Q. (By Mr. Holohan): You have been speaking about Government's Exhibit 30 for identification, and I will hand you what has been marked Government's Exhibits 31 and 32 for identification.

Will you tell us what those are.

A. Yes, sir, these are what we call Grid Sheets. They are engineering work productions made by our employees in our office.

Q. All right, does 31 and 32 come from your records in Casa Grande? A. Yes, sir.

Q. And are they records of which you have custody? A. Yes, sir.

Q. And are they records kept in the regular course of business there? A. Yes, sir.

Q. And required to be kept as such?

A. Yes, sir. [511]

Q. Now, were you asked to bring, or to search your records for a document or documents concerning a 1954 ACP practice for a half mile ditch?

(Testimony of Walter E. Parsons.)

A. Yes, sir.

Q. On the Neely Farm 647? A. Yes, sir.

Q. Were you able to find any such record?

A. We have no records there in our 1954 files on a ditch lining job of Mr. Neely's.

Mr. Holohan: That is all I have of you. You may cross examine the witness.

Cross Examination

Q. (By Mr. Whitney): Have you a record in the 1953 file for that application?

A. I searched the 1954 file, sir.

Q. For 1954 practice? A. Yes, sir.

Q. Have you any record——

A. Of 1953?

Q. No, made in the fall of 1953, for the 1954 practice?

A. No, sir. That would be our records for the 1954 program. Here would be everything that come in from October, 1953, until December 1954. Our program year and the annual calendar year do not coincide. [512]

Mr. Holohan: I intend to call other witnesses to explain that matter to you. This witness merely has the custody of the records.

I understand you came in 1958 to the office?

The Witness: 1958, yes.

Q. (By Mr. Whitney): You haven't examined the records for 1953?

A. For 1953, no, sir. But as I have explained, we could have some 1953 dates that would be in 1954,

(Testimony of Walter E. Parsons.)

and some 1952 that would be in 1953, because the year starts in October, September or October.

Mr. Whitney: That is all. You are going to call another witness?

Mr. Holohan: Yes.

Mr. Stanfield: I have no questions.

Mr. Holohan: Thank you.

(Witness excused.)

Mr. Holohan: Mr. Bates.

RAY W. BATES

called as a witness in behalf of the Government, for rebuttal, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Holohan): State your full name.

A. Ray W. Bates.

Q. By whom are you employed, sir?

A. The United States Department of Agriculture, Soil Conservation Service.

Q. And in what capacity?

A. Work Unit Conservationist.

Q. Where are you presently stationed?

A. In Tucson.

Q. In the year 1954, where were you stationed?

A. Casa Grande.

Q. How long were you stationed at Casa Grande?

A. Approximately 5, 5 and a half years.

Q. What dates, within what years?

A. 1952 to 1958.

(Testimony of Ray W. Bates.)

Q. All right, sir. Do you know the Defendant Joe Short? A. Yes, sir.

Q. Do you know the defendant Rex L. Neely?

A. Yes, sir.

Q. I would like to hand you Government's Exhibit 29 in evidence and Government's Exhibit 30 for identification, and ask you whether your signature appears on those documents?

A. Yes, sir, they do.

Q. All right. And I will hand you 12-B, which is also in evidence, and ask you whether your signature appears on that document? [514]

A. Yes, sir.

Q. And where does your signature appear?

A. (Witness indicates.)

Q. Ray W. Bates there on 12 in evidence?

A. Yes.

Q. And the document is dated 7/23/54, is that correct? A. Yes.

Q. 30 for identification, does that also bear your signature? A. Yes, sir.

Q. And the date? A. Yes, sir.

Q. All right, is there any relationship between 12-B and 30 for identification?

A. One is a carbon copy of the other.

Q. All right. On this, what kind of a form are those documents?

A. Well, we call them by form numbers 247.

Q. And on this Soil Conservation Service setup, what are those 247's? What do they mean, and how are they handled?

(Testimony of Ray W. Bates.)

A. Well, they are requests for us to give assistance now and then to farmers in applying these practices that are listed on the 247.

Q. All right, what do you mean by that, to give assistance?

A. Determining if they are needed, the practice, and then [515] do the survey and check them out as completed.

Q. How are the 247's handled?

A. From the beginning, when we receive them?

Q. All right, from the beginning when you receive them.

A. We receive three copies from the ASC County Committee, and when the need is determined, we sent that in on one copy.

Q. You send one copy back to them?

A. Yes.

Q. All right.

A. And after it is completed, and we certify it, we send another copy to them, and we keep a copy.

Q. Government's Exhibit 30 is a carbon, then, of this 12-B?

A. Yes, sir.

Q. Can you identify that handwriting, "Cancelled 11/8/54"?

A. Well, I assume it is the secretary in the office. It looks like her writing. It isn't my writing.

Q. It is not yours, but it appears to be your secretary during that period?

A. Yes.

Q. This concerns what practice, 12-B and 30 for identification?

A. Land leveling.

(Testimony of Ray W. Bates.)

Q. All right, and is there a farm number connected with that? [516]

A. A farm number?

Q. Yes. A. 86011-647.

Q. Dash 647. All right. That is the last part of it, 647, and it is for what year?

A. That is for the 1954 ACP.

Q. Now, I will hand you what has been marked Government's Exhibit 29 for identification, and ask you to—or, I guess, is that identification or in evidence. That is in evidence, and ask you to look that over, and your signatures appear thereon?

A. Yes, sir.

Q. Is that the R. W. Bates (indicating)?

A. Yes.

Q. Those signatures are yours?

A. Yes, sir.

Q. You will have to speak up louder so that the people at the end of the row can hear you. So speak loudly, please. A. Yes.

Q. All right, this handwriting appearing under the section, "Report of Performance," whose handwriting is that? A. Here?

Q. This little section here above the signature and date. A. It looks like mine.

Q. All right. Now again referring you to Government's [517] Exhibit 29 in evidence, Practice Units Performed, who puts that in?

A. Normally, I do.

Q. All right. Does that appear to be your writing on there? A. It looks like it, yes.

(Testimony of Ray W. Bates.)

Q. All right. And for what practice is this?

A. Concrete ditch lining.

Q. I beg your pardon?

A. Concrete ditch lining.

Q. And the Report of Performance, what is that date?
A. February 8th, 1954.

Q. Again referring you to Government's Exhibit 29, under the statement of Need, which bears your signature, that date is 11/23/53, is that correct?

A. Yes, sir.

Q. All right. How is the sequence between this statement of need, and report of performance? What do you go through on that?

A. Well, after we determine the need, on the concrete ditches, the contractor does the surveying on most of it, and we get the information from them, from their survey notes, and determine the need.

And after the practice is put in, we go out and check it and see that it is in and measure it, turn it in for [518] completion.

Q. In other words, your end of it is the technical side?
A. Yes, sir.

Q. On the date do you go out and inspect the land for need?

A. Are you talking about land leveling, or ditches?
Q. Or for ditches, either one.

A. Somebody from the office does.

Q. Somebody will go out and check the land?

A. Yes.

Q. Then that is, I take it, communicated to you.

(Testimony of Ray W. Bates.)

You were then head of the office down there, weren't you? A. Yes, sir.

Q. In those years? A. Yes.

Q. And you actually signed the reports going out? A. Yes, sir.

Q. These 247's that you have reference to?

A. Yes, sir.

Q. Now, on the matter of performance, how is that handled, then?

A. Well, after we check it out, if it meets specifications, why, we enter the amount performed, and I sign it and send it back in.

Q. All right. I will hand you what has been marked [519] Government's Exhibit 31 for identification, and ask you to examine that document. Do you know by whom that was made out?

A. Charles Woody.

Q. And I will hand you what has been marked Government's Exhibit 32 for identification, and ask you to examine that document, and if you know by whom that was made out.

A. Well, that was by Dick Ackley, surveyor.

Q. Did you have anything to do with that?

A. No, sir.

Q. Again, these are documents that are reported to you in the office? A. Yes, sir.

Q. Now, in these documents, do they show the dates when these actions are taken?

A. July 16th, 1954.

Q. This as to Government's Exhibit 32 for identification, that you have stated the date in July?

(Testimony of Ray W. Bates.)

A. Yes.

Q. What does this type of document relate to?

A. Land leveling.

Q. It relates to land leveling? A. Yes.

Q. Is there a description of the land, without reading it, is there a description of the land that is involved? A. Yes, sir. [520]

Q. Now, can you tell us whether this is an inspection for need or for performance?

A. This was for need.

Q. In other words, the job hadn't been done yet. It is surveyed for need?

A. Yes, sir. It is for determining the need.

Q. When did the Soil Conservation Service start its technical assistance under the ACP program?

A. In 1952, I believe.

Q. Were you assisting the ASC Committees prior to 1954? A. Yes.

Q. Do you know a Doyle Dunkin?

A. Yes, sir.

Q. Do you know by whom he was employed in 1954, and that period?

A. The Department of Interior.

Q. And your department, Soil Conservation, is what department? A. Agriculture.

Q. He didn't work under your office at all, did he?

A. No, sir. I might qualify that statement. On Indian land, when we get the 247's, we send them to the Indian Service, if it is on Indian land, to serv-

(Testimony of Ray W. Bates.)

ice them, then they send them back through our office.

Q. It actually was transmitted through you people where [521] Indian land was involved?

A. Yes, sir.

Q. In other words, Reservation land?

A. Yes.

Q. Now, Mr. Woody is here, isn't he?

A. Yes, sir.

Q. As a witness here? A. Yes.

Mr. Holohan: You may cross examine.

Cross Examination

Q. (By Mr. Whitney): Mr. Bates, Mr. Neely started to do some land leveling as a 1954 practice, did he not? A. Yes, sir.

Q. And that was not approved, is that right?

A. That is right.

Q. And he was never paid for it?

A. That I don't know.

Q. Well, as far as I know, you have no record on it? A. No, sir.

Q. Did you ever approve anything for payment on it? A. In 1954?

Q. Yes, for land leveling. [522]

A. I don't recall of approving any.

Q. You have no records to show?

A. No, sir.

Q. Now, in 1954, on the 1954 practices, did you know that Neely made an application first in November, 1953? A. I don't remember.

(Testimony of Ray W. Bates.)

Q. Well, anyway the evidence shows that on November 5th there was an application made for ditch lining, \$1,500, for the 1954 practice. Do you know whether that ditch was ever put in?

A. Well, I don't know which ditch they are talking about.

Q. Well, were there two ditches put in in 1954?

A. I couldn't say. I can't remember that far back.

Q. Wouldn't your map show it?

A. Yes, if you get the records here.

Q. I don't know anything about it. What is this?

Mr. Whitney: Is this the one you showed him?

Mr. Holohan: Yes. That is land leveling.

Q. (By Mr. Whitney): Referring to Government's Exhibits 31 and 32, does that show anything about a ditch put in in 1954 by Mr. Neely?

A. No, sir. This concerns land leveling.

Q. I see. You have nothing on ditches?

A. Not in my possession, no.

Q. Do you know as a matter of fact whether Mr. Neely put [523] a ditch in in 1954, between January and March, 1954?

A. I couldn't say.

Q. Do you know whether he applied for payment and did put in a ditch in September, 1954?

A. Well, if I had the 247's, I could answer it.

Q. Now, you say that he did no land leveling, that is, he wasn't paid for any?

A. Not that I remember.

(Testimony of Ray W. Bates.)

Q. You know you disapproved it, didn't you, the leveling?
A. Yes, sir, that one job.

Q. And that is represented by Government's Exhibit 12-F in evidence, and 30, about that land leveling, that is right?
A. That is right.

Q. Now, referring to Government's Exhibit 12-D, and E, Government's Exhibits D and E, first. That is dated June 1st, 1953, for a concrete ditch lining, supposedly approved by Dunkin. Do you know anything about that?

A. It never came through our office.

Q. On the back of Government's Exhibit 12-B, do you see that drawing there, that section of land?

A. Yes, sir.

Q. What does that represent?

A. The location where this 5000 yards of dirt was to be moved on this section up here.

Q. And that was not done? [524]

A. It was not completed.

Q. And was not approved nor paid for?

A. We didn't check it out.

Q. I see. The concrete ditch lining which was approved by you on November 5th, 1953, when was that done?

A. It should have been somewhere between the 3rd of November, 1953, and February 8th, 1954.

Q. I see. And if that was done at that time, and not paid for in 1954 until September, 1954, there would be nothing wrong with it, would there?

A. I don't know. We don't have anything to do with the payment.

(Testimony of Ray W. Bates.)

Mr. Whitney: That is all.

Mr. Stanfield: No questions.

Mr. Holohan: May this witness be excused subject to recall?

The Court: He may be.

Mr. Whitney: Subject to recall?

Mr. Holohan: That is right.

(Witness excused.)

Mr. Holohan: I will call Mr. Woody. [525]

CHARLES WOODY, JR.

called as a witness in behalf of the Government, for rebuttal, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Holohan): Tell us your full name?

A. Charles Woody, Jr.

Q. Who do you work for?

A. United States Department of Agriculture, Soil Conservation Service.

Q. What is your job with them?

A. At the present time, I am employed as Soil Conservation Aide.

Q. Do you know the Defendant in this case, Joe Short?

A. Yes, sir.

Q. Do you know the Defendant Rex Neely?

A. Yes, sir.

Q. Have you known them over some period of time?

A. Well, I have known them since 1954.

Q. All right. Where are you presently stationed?

(Testimony of Charles Woody, Jr.)

A. Benson, Arizona.

Q. In 1954, where were you stationed?

A. Casa Grande, Arizona.

Q. When were you stationed at Casa Grande?

A. May, I was up there. I came from Yuma to Casa Grande in May of 1954.

Q. Of what year? 1954? A. 1954.

Q. Are you familiar with the Neely piece of land there in Pinal County, that Section 13?

A. That is out by Maricopa?

Q. Yes, the city of Maricopa. A. Yes.

Q. Have you in your capacity with the Soil Conservation Service gone to that land for official purposes? A. Yes.

Q. Did you go there in 1954? A. Yes.

Q. What was your purpose in going there in 1954?

A. To check the leveling grid on a portion of the farmland, leveling grid.

Q. Would you take the chalk for us, please, and draw the section?

A. (Witness draws on blackboard.) "Indian Reservation." Bill Chatham's home is over here (indicating).

There is a well approximately here, at this time, in 1954. I haven't been back to the farm since. There was a ditch here.

There was a road, farm road in here, and all the [527] way through, if I remember correctly. There was machine sheds here. I believe there was a well

(Testimony of Charles Woody, Jr.)

here, with some houses, and I believe there was a well here.

This section or portion of land that I was on in 1954 was this (indicating).

Q. That was the land leveling practice that you were sent to inspect in 1954?

A. That is right.

Q. You have also inspected other land leveling on that same land, haven't you, in this same section? A. Yes.

Q. In what year?

A. The last time I was there was in 1956.

Q. And what was that land leveling, what area was that covering?

A. It was in this area here. This is in 1956. (Indicating.) That was this portion.

Q. That is the upper northern portion, then?

A. Yes.

Q. The crossbars of the section, or the portion of the land is 1954? A. Yes, 1954.

Q. Take your place, please.

Would you look at 31 for identification, and see whether you recognize that. [528]

A. This is the portion of the farm I was on in 1954.

Q. All right. And what is the document?

A. The document, as stated on the bottom, "Rex Neely, Grade Check of August 13th, 1954."

Q. Who made up the document?

A. I made it up.

Q. And as a result of what?

(Testimony of Charles Woody, Jr.)

Q. As the result of checking a land leveling job on this portion of the field.

Q. When did you check the land leveling?

A. Apparently August 13th. I apparently did the field work probably the day before. The field notes, engineering field notes would show that, and I made this probably the following day, or so.

Q. That is in August of 1954?

A. That is right.

Q. Did you have any conversation with the Defendant concerning this land leveling, the Defendant Rex Neely?

A. Concerning this land leveling? Yes, I did.

Q. All right, did you make a note of that conversation? A. Yes.

Q. And on that same document? A. Yes.

Q. (Handing document to witness.) What is 32 for identification? [529]

A. This is the original leveling grid or skin sheet, or grid sheet with the computations for the required land leveling on this particular section, and this particular portion of the farm.

Q. Do I understand you, then, you go out and run a survey on it first to show what should be done, and then the next is you check it to see whether that has been done?

A. That has been accomplished, that is right.

Mr. Holohan: At this time, we offer in evidence Government's Exhibits 30, 31, and 32 for identification.

Mr. Whitney: If the Court pleases, we object

(Testimony of Charles Woody, Jr.)

to them on the grounds there is no charge in the indictment in connection with the land leveling, and I fail to see the materiality or the competence of this testimony, on that ground.

The Court: It may be received.

Mr. Stanfield: No objection.

The Clerk: Government's Exhibits 30, 31, and 32 in evidence.

(Said Documents were received in evidence and marked as Government's Exhibits 30, 31, and 32 respectively.)

Q. (By Mr. Holohan): Now, I will show you what has been marked Government's Exhibit 31, I believe it is. A. Yes.

Q. 31 in evidence. You said that you had a [530] conversation with the Defendant which you noted down? A. Yes.

Q. Now, I call your attention to a note up here on the right-hand corner of the exhibit, and is that in your handwriting?

A. It is. It is in my printing.

Q. All right, your printing. Okay. Would you read that for us.

A. "This sheet was mailed to Mr. Neely August 13, 1954. He informed us that it had never been made available to contractor as was intended."

And my initials.

Q. Now, this note section, was that also in your handwriting? A. It is.

Q. All right, would you read that.

A. "Note: Mr. Neely came and informed us con-

(Testimony of Charles Woody, Jr.)

tractor had notified him the field was to grade, and that I had informed them that it was. The field was not to grade at the time of this check and no information was given out to indicate that it was. Mr. Neely informed us that all stakes have been pulled and field deep plowed eliminating possibility of further check."

And my initials.

Q. All right. From that document, does that show that [531] the land leveling was done in accordance with your standards?

A. No. No, there was still work to be done.

Q. So it was not approved then?

A. No. Well, I mean as far as I was concerned, it was not.

Q. You made your report as——

A. That there was still work to be done.

Q. That was as to the land leveling?

A. That is right.

Q. All right. Could you tell us what was basically this land leveling? What was it? What was it that was going to be done, as you recall?

A. Well, as I recall, there was to be leveled a tenth of a foot plus or minus tolerance, and when I went back to re-stake it, re-grid it, get new elevations on it, I took the shots halfway between the stake lines, and adjusted the computed elevations, because often contractors leave the centers high or low.

Q. The places that are staked, they are usually level, but some of those places halfway aren't?

(Testimony of Charles Woody, Jr.)

A. Yes. And I recomputed the grade and the elevation that I got, and it didn't conform.

Q. It didn't conform. All right. Was there something about also some of the land being low?

A. Well, it is indicated there on the sheet, yes.

Q. I don't think many of us can read that, [532] but from your recollection, could you give us any help on the board as to that?

A. At the time of the check, if my memory serves me correctly, and I am sure it does, there was a low area in here (indicating on diagram) below the well, or to the west of the well, and there was highs in here.

The stake lines had been broken out to grade, but the center of the panel and the two stake lines were not.

Q. You don't have anything to do with payment?

A. No.

Q. You just go out and do the technical survey work?

A. That is right.

Q. And report what you find?

A. That is correct.

Q. Who do you report to?

A. I was reporting to Mr. Ray Bates, working in conservation.

Mr. Holohan: You may cross examine the witness.

Mr. Whitney: I don't think I have any questions.

Mr. Stanfield: I have no questions.

The Court: That will be all.

(Testimony of Charles Woody, Jr.)

Mr. Holohan: May this witness be permanently excused?

The Court: He may be.

(Witness excused.) [533]

The Court: The court will stand at recess until ten o'clock in the morning.

(An adjournment was taken to Thursday, September 18, 1958, at ten o'clock a.m.) [534]

Thursday, September 18, 1958

Ten O'Clock A.M.

Court convened pursuant to adjournment.

Present: Same as before.

The Court: You may continue.

Mr. Hays: The Government rests with its rebuttal, your Honor.

The Court: Do you have any surrebuttal?

Mr. Stanfield: Defendant Short has none.

Mr. Whitney: Mr. Patterson, please.

J. E. PATTERSON

called as a witness in behalf of the Defendant Jeely, in surrebuttal, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Whitney): State your name, please.

A. J. E. Patterson. [535]

Q. Where do you reside, Mr. Patterson?

A. Chandler, Arizona.

Q. What is your business?

(Testimony of J. E. Patterson.)

A. It is custom tillage and leveling.

Q. Do you know Mr. Rex L. Neely?

A. I do.

Q. Have you done or performed any tillage work, or leveling, rather, for Mr. Neely?

A. I have.

Q. For how long a period of time?

A. Oh, for the past ten years.

Q. Do you remember doing any work for Mr. Neely for which you billed him on February 13, 1954?

A. Yes, sir.

Mr. Whitney: Mark this, please.

Mr. Holohan: We have no objection to its being marked and introduced in evidence.

Mr. Whitney: All right.

The Court: It may be received.

The Clerk: Defendant's Exhibit T in evidence.

(Said Statement of Account was received in evidence and marked as Defendant's Exhibit T.) [536]

Q. (By Mr. Whitney): Now, Mr. Patterson, referring to this writing here, this map, this is supposed to be north, and this south. This is east, and this is west. (Indicating on blackboard.)

Referring to this Defendant's Exhibit T in evidence, can you tell me which quarter-section you were working on at that time, if you know?

A. No, I can't tell you.

Q. Have you ever worked on the northwest quarter of this section?

A. We have levelled all four quarters of this

(Testimony of J. E. Patterson.)

section, but I don't know which one of these is which. I don't have any records.

Q. In other words, you didn't keep track except by hours on the place? A. Yes.

Q. But that was on the Neely farm at Maricopa?

A. Yes, sir.

Q. And during that period of time, you have levelled on all four sections? A. Yes.

Q. But you don't know when you levelled on either one of those sections, and yet you did the work?

A. Well, I don't know when we levelled the west half. I know the east half of the section was the last two pieces of ground we worked on.

But I am in question on these two here (indicating).

Q. You don't know when? [537]

A. No, I can't tell.

Q. That leveling was done prior to, sometime in 1954, prior to February 19 when you billed him, is that right? A. Yes, sir.

Mr. Whitney: That is all.

Mr. Holohan: We have no questions.

Mr. Whitney: That is all, Mr. Patterson. May he be excused?

The Court: Yes.

(Witness excused.)

Mr. Whitney: The Defendant Neely rests.

Mr. Hays: Nothing more, your Honor.

Mr. Whitney: I would like to make a motion, if the Court please.

The Court: All right. The Court will stand at recess for a few minutes.

(The Jury retired from the courtroom. The following proceedings were had out of the hearing and presence of the Jury.)

The Court: All right.

Mr. Whitney: The Defendant Neely now at the close of all the evidence moves the Court for a judgment of acquittal on each and every count in the indictment.

In this connection, it adopts the argument made at the close of the Government's case, and particularly [538] wishes to call the Court's attention to Paragraphs VII to XI, inclusive, in which Mr. Neely is charged with aiding and abetting Short, on the theory that there is not a scintilla of evidence in the record that justifies a verdict of guilty on those counts.

And the same may be said of Count XII, the conspiracy count.

The Court: I will deny your motion.

(Recess.)

(After which Counsel for the Government and Counsel for the Defendants argued the case to the Jury.)

The Court: The Court will stand at recess until ten o'clock in the morning.

(Thereupon an adjournment was taken to Friday, September 19, 1958, at the hour of ten o'clock a.m.) [539]

Friday, September 19, 1958

Ten O'Clock A.M.

Court convened pursuant to adjournment.

Present: Same as before.

Court's Instructions to the Jury

The Court: It now becomes the duty of the Court to instruct you as to the law that applies to this case.

You have heard the Indictment read several times, so I will only refer to it briefly now.

Count I charges that on or about April 5th, 1954, in this District, the defendant Rex L. Neely, well knowing Joe L. Short to be an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and in such capacity charged with the duty of proper administration of the cotton acreage allotment and marketing quota program of the United States as the defendant well knew, did wilfully and unlawfully tender to the said Joe L. Short a check in the amount of \$1,620, dated April 5, 1954, drawn on the Valley National Bank, [540] Mesa, Arizona, signed by the defendant as drawer, and payable to the order of Joe Short, with intent to influence the said Joe L. Short, to act in his aforesaid official capacity in committing and allowing the commission of a fraud against the United States, to-wit: the procuring of a cotton allotment for the defendant in excess of that to which the defendant was lawfully entitled under the cotton acreage allotment and marketing quota program of the United States.

Now, that only charges Neely alone with an offense.

Count II charges that on or about April 5, 1954, within the District of Arizona, "the defendant Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and charged with the duty of administering the cotton acreage allotment and marketing quota program of the United States, did, with intent to have his actions influenced in a matter before him in his official capacity, to-wit: the procuring of an additional cotton acreage allotment for Rex L. Neely, wilfully and unlawfully accept from Rex L. Neely a check in the amount of \$1,620, dated April 5, 1954, drawn on the Valley National Bank, Mesa, Arizona, signed by the said Neely as drawer, and payable to the order of Joe Short."

That count only charges Short with an offense, the acceptance of a bribe.

Count III is the same as Count I, except the amounts are different, and the date also is different, and the amount of the check is different.

Count IV charges Short with the receiving of this check for \$1410.

Count V charges the same, only the check involved in this count is \$1750.

Count VI charges Short with receiving this \$1750.

Count VII charges a different offense.

It charges: "On or about the 19th day of March, 1954, Joe L. Short, being then and there an employee of the Pinal County Agricultural Stabiliza-

tion and Conservation Committee, an agency of the United States, and being charged with the duty of keeping accounts and records of said agency, did within the District of Arizona, unlawfully, knowingly and feloniously, with intent to deceive, mislead, injure and defraud the United States and persons to the Grand Jury unknown, make and cause to be made a false and fictitious entry on the official listing sheets of the Pinal County Agricultural Stabilization and Conservation Committee Office for the 1954 cotton crop year, a record relating to and connected with his duties, by indicating thereon 400.8 acres of cotton allotment acreage apportioned to [542] Farm 647, well knowing said entry to be false."

The second paragraph charged that "the defendant Rex L. Neely did unlawfully aid, abet and induce the defendant Joe L. Short in the commission of the acts charged in paragraph One of this count."

Count VIII also charges the making of false entries by Short, aided and abetted by Neely.

Count IX charges the same.

Count X also charges a like offense.

Count XI charges a like offense.

Count XII is what is known as a Conspiracy count.

It charges that:

"Commencing on or about the 15th day of September, 1953, and continuing thereafter to on or about the 28th day of December, 1956, the defendants, Rex L. Neely, hereinafter referred to as Neely, and Joe L. Short, hereinafter referred to

as Short, did within the District of Arizona unlawfully, wilfully and knowingly conspire together to defraud the United States in the exercise of its governmental functions of administering the cotton acreage allotment and marketing quota program and other agricultural programs free from bribery, improper influence, dishonesty, unlawful impairment, fraud and corruption, and in its right and interest in the conscientious, honest and faithful service, [543] judgment, determination and action of the defendant Short, as a duly appointed employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, free from bribery, corruption, improper influence, dishonesty, bias, hope of unlawful reward and fraud.

"2. During the existence of the conspiracy and at all times mentioned herein, the defendant Neely was a farmer engaged in the occupation of raising, among other things, crops of cotton.

"3. During the existence of the conspiracy and at all times mentioned herein the defendant Short was employed by the Department of Agriculture in the Pinal County Agricultural Stabilization and Conservation Committee Office as office manager.

"4. It was a part of the conspiracy that the defendant Short should contrive to secure for the defendant Neely a cotton allotment from the Agricultural Stabilization and Conservation Committee in Pinal County far in excess of the allotment to which Neely was lawfully entitled under the cotton support program, thereby enabling the defendant

Neely to market the excess cotton without penalty.

"5. It was a further part of the conspiracy that Short should share in the illegal benefits accruing [544] to Neely by receiving payments in money from Neely on a per acre basis.

"6. It was a further part of the conspiracy that Short should alter, change, and falsify the records of the Agricultural Stabilization and Conservation Committee Office to provide additional cotton allotment acreage for Neely and to prevent the discovery or disclosure of the illegal activity.

"7. It was a further part of the conspiracy that Neely should apply for and Short should process requests for Agriculture Conservation Program payments from Department of Agriculture to which Neely was not entitled; and that such payments should be substantiated by the presentation of false documents and fraudulent misrepresentations to said department by Short."

Then there are several overt acts alleged.

"For the purpose of carrying out the said conspiracy and to effect the objectives and purposes thereof, the defendants did and committed the following overt acts:

"(1) On or about March 19, 1954, Short altered the amount of Neely's 1954 acreage cotton allotment on the official listing sheet of the Pinal County Agricultural Stabilization and Conservation Committee Office by lining out the figures 319.8 and inserting above it the figures 400.8.

"(2) On or about March 30, 1954, Short signed the fictitious name, W. R. Burns, to a lease, by

which 160 acres of land having the same legal description as Farm 595 was leased to Neely.

“(3) On or about April 15, 1954, Neely issued a check payable to Short for \$1,620.

“(4) On or about November 22, 1954, Neely issued a check payable to Short for \$1,410.

“(5) On or about August 18, 1955, Neely signed his Form 578, an official form of the aforesaid office, which showed 426.5 acres of planted short staple cotton and none destroyed, and at the same time accepted his marketing card and signed it, on which marketing card was shown that his allotment was 306.1 acres and that his planted acreage was 306.1.

“(6) On or about December 9, 1955, Neely issued to Short a check for \$1,750.

“(7) On or about October 3, 1956, Neely signed his Form 578, an official form of the aforesaid office for short staple cotton, showing his planted acreage as 477.7 and at the same time accepted his short staple marketing card which showed his planted acreage as 306.7.

“(8) On or about December 1, 1956, Short [546] instructed H. L. Mathis to make up a new Notice of Allotment showing that Neely had an acreage allotment of 367.7 acres.

“(9) On or about August or September, 1954, Neely requested Agriculture Conservation Program assistance for a ditch lining practice indicating that construction of the ditch would be commenced by Neely in September.

“(10) On or about September 27, 1954, Neely

made application for payment in the amount of \$1,500."

You may have this indictment in the Jury room with you.

Now, the Federal statutes under which the indictment was drawn read as follows:

"Whoever promises, offers, or gives any money or thing of value, or makes or tenders any for the order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value to any officer or employee or person acting for, or on behalf of the United States, or any department or agency thereof in any official function under or by authority of any such department or agency, or to any officer or person acting for or on behalf of either House of Congress, or of any Committee of either house, or [547] both houses thereof, with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty * * * shall be punished as the act provides."

Now, this is the Acceptance—The one I just read has to do with Bribery. Now this is the acceptance of a bribe; 18 U.S.C., 202.

“Acceptance or solicitation by officer or other person. Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance [548] of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be punished as the Act provides.”

The next section has to do with false entries.

“False entries and Reports of Money or Security. Whoever being an officer, clerk, agent, or other employee of the United States or any of its agencies charged with the duty of keeping accounts or records of any kind, with intent to deceive, mislead, injure or defraud, makes in any such accounts or records any false or fictitious entry or record of any matter relating to or connected with his duties, shall be punished as the Act provides.”

The next Section of the Code defines Conspiracy. That is the last Count of the Indictment.

“Conspiracy to Commit Offense or to Defraud the United States. If two or more persons conspire

either to commit any offense against the United States or to defraud the United States, or any agency thereof, in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as the Statute provides.”

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of partnership in criminal purposes in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved. What the evidence must show in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

It is not necessary for the prosecution to prove that all the means or methods set forth in the [550] indictment were agreed upon to carry out the conspiracy, or that all such means or methods were actually used or put into operation. But it is necessary that the evidence establish to the satisfaction of the jury that one or more of the means or methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment.

In order to establish the offense of conspiracy charged in the indictment, the evidence must show beyond a reasonable doubt, first, that the conspiracy described was formed and existing at or about the time alleged; second, that the accused knowingly and willfully became a member of the conspiracy.

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and, fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

If you find from the evidence beyond a reasonable doubt that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete; and it is [551]

complete as to every person found by you to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

In a case where two or more persons are charged with the commission of a crime, the guilt of the accused may be established without proof that all the defendants did every act constituting the offense.

“Whoever commits an offense against the United States, or willfully aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

“Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”

Every person who thus willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and purposely and with specific intent to do what the law forbids, or with specific intent to fail to do what the law requires; that is to say, with evil motive or bad purpose either to disobey or to disregard the law.

In order to aid and abet another to commit a crime it is necessary that a defendant willfully associate himself in some way with the criminal venture; and that he willfully participate in it as in something he wishes to [552] bring about; and

that he willfully seek by some action of his to make it succeed.

To conspire to defraud the United States means to cheat the government out of property or money, or to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation or the over-reaching of those charged with carrying out the governmental intention.

In the 1954 Agricultural Conservation program referred to in this subject as the 1954 Program, administered by the Department of Agriculture, the Federal Government will share with farmers and ranchers the cost of carrying out approved conservation practices in accordance with the provisions contained in this sub-part, with such modifications thereof as may be hereafter made. The approved practices will be deemed to have been carried out during the program year started after the beginning of the program year if the County Committee determines that they are substantially completed by the end of the program year.

However, no practice will be eligible for federal cost sharing until it has been completed in accordance with [553] all applicable specifications of the Program's provisions.

The provisions of the Program contained in this sub-part are applicable to the continent of the

United States. The cost will be shared with the farmer or rancher only on satisfactorily performed conservation practices, for which Federal cost sharing was requested by the farmer or rancher for the conservation work as begun. Federal cost shared is limited to \$1500. (a) The total of all Federal costs shared under the 1954 program to any person with respect to farms, ranching units, and turpentine places in the United States, including Alaska, Hawaii, Porto Rico, and the Virgin Islands, shall not exceed the sum of \$1500.

In a criminal case the defendant is not required to produce evidence or to disprove the facts necessary to establish the crime or to establish his innocence. A defendant is presumed to be innocent at all stages of the trial, and to overcome this legal presumption, the evidence must be clear and convincing and sufficiently strong to convince you beyond a reasonable doubt that the defendant did commit the offense charged.

Every defendant under the law is presumed to be innocent and that presumption is by law evidence in his favor, and this presumption of innocence is an instrument of proof in his favor and remains with him during your deliberations until it is overcome by evidence that is clear [554] and sufficiently strong to convince you beyond a reasonable doubt that he is guilty of the precise crime he is charged with.

I charge you that you may not and must not draw any inference whatsoever as to the guilt of a defendant from the fact that such defendant was

indicted, or from the indictment itself, and that fact must not in any wise enter into your deliberations, as these matters are purely and simply the means and methods of bringing a defendant to trial.

In this case, you must decide separately the questions of the innocence or guilt of each of the two defendants. If you cannot agree upon the innocence or guilt of both the defendants, but do agree as to the innocence or guilt of one of them, you must render a verdict as to the one upon whose innocence or guilt you do agree.

In connection with each of the Counts in the Indictment in which defendant Neely is charged, circumstantial evidence is relied upon to establish certain indispensable elements of the alleged crimes. I charge you that in the case of circumstantial evidence the law requires that such proof must be such as to exclude every reasonable hypothesis consistent with innocence. If from this circumstantial evidence, there may be drawn one inference consistent with innocence and another inference consistent with guilt, I [555] charge you that you must accept the inference consistent with innocence. Facts which merely give rise to a reasonable and just inference that the defendant Neely did commit the crimes charged, do not necessarily exclude every other reasonable inference or hypothesis. If the evidence can be reconciled either with guilt as well as with innocence, then the law requires that a defendant in such a case be given the benefit of the doubt, and you must acquit him. Before you are warranted in convicting the defendant, the facts

proved must be consistent with and point to guilt only, and must be inconsistent with innocence. It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant; they must exclude every other reasonable hypothesis, except that of the defendant's guilt, and, unless they do so beyond a reasonable doubt, you must find the defendant not guilty.

Evidence of reputation of the defendant's good character has been received in evidence. This evidence of good character is a fact that it is your duty to consider along with other facts in the case, and I charge you that the fact of good character is a fact which, when considered in connection with all other evidence in the case, may, like other facts, generate a reasonable doubt.

I charge you that a specific criminal intent connoted by the word "wilfully" cannot be imputed to one [556] defendant merely because you may believe that the other defendant had a specific criminal intent. The fact, if it is a fact, that one defendant had a specific criminal intent is no evidence or proof in and of itself that the other defendant had a specific criminal intent.

In Counts 7, 8, 9, 10 and 11 of the Indictment, the defendant Joe L. Short is charged with being an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and charged with the duty of keeping accounts and records of said agency. It is charged in those counts that said de-

fendant Joe L. Short unlawfully, knowingly and feloniously did make certain entries in the books and records of the Pinal County Agricultural Stabilization and Conservation Committee well knowing said entries to be false. In this connection, I charge you that the defendant Rex L. Neely is not and was not, during the times mentioned in said Counts, an employee or officer of said Pinal County Agricultural Stabilization and Conservation Committee, and did not make any entries in the books and records of said committee. However, in the Counts mentioned herein, the defendant Rex L. Neely is charged with unlawfully aiding, abetting and inducing the defendant Joe L. Short in the commission of the acts charged to Short in said Counts.

I charge you further that one who does not [557] actively commit the offense but who knowingly aids, promotes or encourages its commission either by act or counsel or both, is deemed in law to be an aider or abettor, but shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent. To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding the commission of such criminal offense.

In Counts 1, 3, and 5 of the Indictment, the defendant Rex L. Neely is charged with unlawfully tendering to the defendant Joe L. Short the amounts of money set forth in each of the respective Counts with the intent to influence said Joe L. Short to act in his official capacity in committing

and allowing the commission of a fraud against the United States, to-wit, the procuring of a cotton allotment for the defendant Neely in excess of that to which the defendant Neely was lawfully entitled under the Cotton Acreage Allotment and Marketing Quota Program of the United States.

In the alternate Counts, 2, 4, and 6, Joe L. Short is charged with accepting the sums of money tendered by Rex L. Neely with the intent to have his acts influenced in the procuring of a cotton allotment for the defendant Neely in excess of that to which the defendant Neely was lawfully entitled under the Cotton Acreage Allotment and Marketing Quota Program of the United States. You are [558] instructed that Neely is not charged in the alternate Counts, 2, 4, and 6, with any crime.

In reference to Counts 1, 3, and 5, the defendant Neely cannot be convicted unless you find beyond a reasonable doubt that at the time claimed by the United States the money was given by Neely with the corrupt intention on his part of corrupting Joe L. Short and influencing his official action in procuring an additional fraudulent cotton allotment for Neely. You are instructed, and I so charge you, that the procurement by Joe L. Short, in his official capacity, of an additional fraudulent cotton allotment for Neely does not in itself prove that Neely is guilty as charged in these particular Counts. You must find beyond a reasonable doubt from all of the evidence that Neely tendered the amounts of money alleged with the intention and for the deliberate and express purpose of influenc-

ing Joe L. Short to secure for him an additional fraudulent cotton allotment.

The fact that Neely purchased and procured, or had an additional cotton allotment or planted cotton in excess of his official allotment does not of itself prove a violation of any criminal law by Neely. I instruct you that it was not against the law for the defendant Neely to lease land with a cotton allotment or secure additional cotton allotment or allotments. [559]

If you believe from all of the evidence that Neely believed and relied upon the representations made to him by Joe L. Short in reference to the additional cotton allotment, and you further believe from the evidence that Neely tendered the amounts of money set forth in said charges honestly and in good faith believing that he was leasing the Burns farm and thereby securing a bona fide additional cotton allotment, and further believe from the evidence that Neely did not tender said money, or any part of it, to Short for the purpose and with the intent of corrupting and influencing Short in his official capacity, then you must find the defendant Neely not guilty as to Counts 1, 3, and 5.

I instruct you that the overplanting of a cotton allotment in itself was not a crime. I instruct you further that in the event you find from all of the evidence that Rex L. Neely did in the years 1954, 1955 and 1956 overplant, that is, plant more acres of cotton than was permitted under his allotment, that that fact in itself was not a crime. Under the law and rules and regulations anyone who over-

planted his cotton allotment was required, upon receiving notice of the acreage overplanted from the County Committee, to either plow up and destroy and the amount of acres or fractions of acres determined to be overplanted, or to pay the United States Government, within the time allowed, and after receiving said notice, the prescribed penalty for the acreage overplanted. [560]

In connection with the conspiracy indictment, it is necessary that you keep in mind exactly what the alleged agreement between the alleged conspirators was, for the defendants are not charged with, nor can they be convicted of, having entered into and knowingly participated in furthering some other or different agreement. I charge you that the burden is upon the prosecution to prove beyond a reasonable doubt that the particular agreement alleged did exist and was the precise one alleged by the prosecution. If, after considering the whole of the evidence, you are in doubt whether the precise agreement alleged did exist, then I charge you that you must return a verdict of not guilty as to the alleged conspiracy.

Evidence received during the trial because applicable to one or more of the defendants is not thereby proof of the existence of a conspiracy. No one can be made a conspirator by declarations or acts of someone else, but only by his own acts.

I charge you that the evidence must show beyond a reasonable doubt that the defendant Neely knowingly joined in the conspiracy alleged in the indictment, before you may find him guilty of the crime charged, and even if the defendant Neely committed

one or more of the overt acts alleged in the indictment, he does not thereby violate the [561] Conspiracy Statute, unless the evidence shows that beyond a reasonable doubt he joined in the specific conspiracy alleged in the indictment.

An admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and heard the statement made.

In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

Now by the finding of the indictment in this case no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with or responsibility for the acts charged against him. The defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction.

A reasonable doubt is such a doubt as you may have in your minds when after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt.

In order that the evidence submitted shall afford [562] proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the

most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture, for it is difficult to prove a thing to an absolute certainty. You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you.

Without its being restated or repeated, you are to understand that the requirements that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized because of any feeling of sympathy or other bias to apply a strained construction, one that is unreasonable, in order to justify a certain verdict, when, were it not for such feeling or bias, you would reach a contrary conclusion, and whenever after a careful consideration of all the evidence your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced that a conclusion of innocence must be adopted. [563]

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon the trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which

he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, and integrity, or his motives, or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole, or any part of it, as may be dictated by your judgment as reasonable persons.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the Government or the Defendant, and the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, in every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the [564] jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness's testimony. You are not limited in your consideration of the evidence to the bald expression of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable persons.

There is nothing peculiarly different from the way a jury is to consider the proof in a criminal

case, and that by which men give their attention to any question depending upon evidence presented to them.

You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment.

While remembering that the defendants are entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains, the Government is entitled to a verdict.

Jurors are expected to agree upon a verdict if they can conscientiously do so. You are expected to consult with one another in the Jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

In determining what your verdict should be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out must be wholly left out of account and disregarded.

The opinion of the Judge as to the guilt or innocence of the defendant, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

Have I omitted anything, gentlemen?

Mr. Hays: No, your Honor.

Mr. Stanfield: No, your Honor.

Mr. Whitney: No, sir.

The Court: The Jury will retire from the Court room for a few minutes.

(Thereupon the Jury retired from the court-room, and the following proceedings were had out of the hearing and presence of the Jury.)

The Court: All right, gentlemen, if you have any objections or exceptions.

Mr. Whitney: If the Court pleases, in connection with [566] the Government's Instruction No. 3, the defendant Neely objects to the giving of such instruction on the grounds that it is not the law in this case, that under the particular statute and section, 2073, 18 U.S.C., covering Counts 7 to 11, inclusive, in the Indictment, the defendant Neely could not commit the substantive offense charged against Short, because the Statute is directed against an officer, agent, or employee of the United States, or any of its agencies, and Neely could not be a principal.

Neely is charged in the Indictment separately with unlawfully aiding and inducing Short in the commission of the acts charged, and while the acts charged against Neely, if proven, may be punished as a conspiracy, he can only be charged with reference to aiding, abetting, and inducing defendant Short.

The defendant Neely objects to the giving of the Government's Instruction No. 5, which is apparently directed against Short, isn't it, Mr. Hays?

Mr. Hays: No. It is conspiracy to defraud, to

cheat the Government out of property, and so forth.

Mr. Whitney: Mr. Neely is not charged with carrying out the Government's intention. He couldn't be.

And the Defendant Neely excepts to the Court's refusal to give Defendant Neely's requested instructions Nos. 3, 8, 9, and 16. [567]

If the Court please, for the record, I object to the taking out of Lines 20, 21, and 22 of Defendant's Instruction Number 12, reading, "In this connection, I charge you that the defendant Rex L. Neely cannot be regarded in law as a principal in the crimes charged in Counts 7, 8, 9, 10 and 11", on the same grounds that I objected to Government's Instruction No. 3.

I believe that is all.

The Court: All right, will you bring in the Jury, Mr. Bailiff.

(Thereupon the Jury returned to the courtroom, and the following proceedings were had in the hearing and presence of the Jury.)

The Court: After you retire to your Jury room, ladies and gentlemen, you will select one of your number to act as foreman, and you will proceed with your deliberations.

Two forms of verdict have been prepared. One is for the defendant Neely, and one for defendant Short. These have been prepared for your guidance. They read as follows; omitting the title of the court and cause:

"We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the

defendant, Rex L. Neely as charged
 in Count I; as charged in Count III;
 as charged in Count 5;
 as charged in Count VII; as charged
 in [568] Count VIII;as charged in
 Count IX; as charged in Count X;
 as charged in Count XI;
 as charged in Count XII.”

You will insert in those blanks whatever your finding may be, either Guilty or Not Guilty.

Another form of verdict, as I say, has been provided for Joe L. Short.

Any verdict, as you know, must be the unanimous verdict of the Jury, and the guilt or innocence, I believe I have stated that before, of each defendant must be determined separately.

You may retire now in the custody of the Bailiff.

(Thereupon the Jury retired to deliberate upon its verdict.)

The Court: The Court will stand at recess. [569]
 [Endorsed]: Filed March 13, 1959.

[Endorsed]: No. 16418. United States Court of Appeals for the Ninth Circuit. Rex L. Neely, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: March 30, 1959.

Docketed: April 1, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
 the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16418

REX L. NEELY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS
ON WHICH HE INTENDS TO RELY

Comes Now Appellant, Rex L. Neely, through his attorneys undersigned, and hereby respectfully sets forth the following points upon which he intends to rely in the above-entitled case on appeal:

(1) Count V of the Indictment upon which appellant was convicted fails to state an offense against the United States.

(2) The admission by the court below of evidence, oral and documentary, over the objection that the proper foundation was not laid.

(3) The admission by the court below of evidence, oral and documentary, over the objection that such evidence was irrelevant, incompetent, and immaterial.

(4) Failure of the District Court to enter a judgment of acquittal on appellant's motion at the close of the government's case and at the close of the entire evidence as to Count V of the Indictment on which the appellant was convicted, for the reason that the evidence was and is insufficient upon

which to base a verdict of guilty on said Count V of the Indictment.

Dated: March 30, 1959.

WHITNEY & LaPRADE,
/s/ By LOUIS B. WHITNEY,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 1, 1959. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties to the above-entitled action, acting through their respective attorneys undersigned, that all original exhibits contained in the record on appeal in the above-entitled action may be considered by the above-entitled court in their original form without reproduction in the printed record.

Dated at Phoenix, Arizona, this 27th day of March, 1959.

WHITNEY & LaPRADE,
/s/ By LOUIS B. WHITNEY,
Attorneys for Appellant.

/s/ JACK D. H. HAYS,
United States Attorney for the District of Arizona,
Attorney for Appellee.

[Endorsed]: Filed April 1, 1959. Paul P. O'Brien,
Clerk.

No. 16418

In the
United States Court of Appeals
For the Ninth Circuit

REX L. NEELY

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court,
District of Arizona

LOUIS B. WHITNEY
LORETTA WHITNEY
PAUL W. LAPRADE

810 Luhrs Tower
Phoenix, Arizona

Attorneys for Appellant

FILED

SEP - 8 1959

PAUL P. O'BRIEN, CLERK



SUBJECT INDEX

	Page
Nature of Case.....	1
Basis of Jurisdiction.....	3
Statement of the Case.....	3
The Indictment	3
The Faets	4
The Faets on Count V upon Which Appellant Was Convicted	5
Question Involved	8
Specifications of Error.....	8
Argument	9
The Verdict on Court V Is Unsupported by the Evidence.....	9
Conclusion	24
	Appendix
	Page
Appendix 1	1
Appendix 2	10
Appendix 3	13
Appendix 4	26

TABLE OF AUTHORITIES CITED

CASES CITED	Pages
Direct Sales Co. v. United States, 319 U.S. 711, 63 Sup. Ct. 1269	23
Ingram v. United States, U.S., 79 Sup. Ct. 1314, 1320	23
Morissette v. United States, 342 U.S. 246, 72 Sup. Ct. 240.....	13
People v. Coffey, 161 Cal. 433, 119 Pac. 901.....	14
Robinson v. United States, 8 Cir., 32 Fed. (2d) 505, 66 A.L.R. 468	13
Schneider v. United States, 9 Cir., 192 Fed. (2d) 498, 500.....	4
Sherman v. United States, 356 U.S. 369, 78 Sup. Ct. 819.....	13
Tot v. United States, 319 U.S. 463, 63 Sup. Ct. 1241.....	13
United States v. Klosterman, 248 Fed. (2d) 191, 194.....	13
United States v. Labovitz, et al, 3 Cir., 251 Fed. (2d) 393.....	14
United States v. Lynn, D.C., E.D. Ky., 132 Fed. Sup. 605.....	11
United States v. Nedley, 3 Cir., 255 Fed. (2d) 350, 357.....	14

STATUTES CITED

Title 7, U.S.C.A., Section 1374.....	10, 11
Title 18, U.S.C.A.:	
Section 201	1, 2, 8
Section 202	1
Section 371	1, 2
Section 2073	1, 2
Section 3231	3
Title 28, U.S.C., Section 1291.....	3

OTHER AUTHORITIES CITED

8 Am. Jur., par. 6, page 888.....	12, 14
22 Corpus Juris Secundum, par. 32, page 91.....	14
Wharton's Criminal Evidence, 12th ed., Vol. 1, page 244.....	14
Wharton's Criminal Law and Procedure, Vol. 3, pages 774, 775	14
26 Words & Phrases, pages 343-348.....	14

No. 16418

In the

United States Court of Appeals

For the Ninth Circuit

REX L. NEELY

VS.

UNITED STATES OF AMERICA

Appellant,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court,
District of Arizona

NATURE OF CASE

The appellant Neely (defendant in the court below), and one Joe L. Short, were charged by Indictment filed on October 23, 1957, with violating Title 18, U.S.C.A., Sections 201, 202, 2073, and 371. Appellant was charged in Counts I, III, and V with tendering Short bribes in the form of certain checks drawn on the Valley National Bank, Mesa, Arizona, executed by the appellant and payable to the order of Short (18 U.S.C.A. 201).

In Counts II, IV, and VI, Short was charged with accepting the alleged bribes tendered in Counts I, III, and V (18 U.S.C.A. 202).

Counts VII to XI, inclusive, charged Short with making false and fictitious entries and charged Neely with aiding, abetting, and inducing Short to commit said acts (18 U.S.C.A. 2073).

Count XII charged appellant and Short with conspiracy (18 U.S.C.A. 371).

The conspiracy count embraced, among other substantive counts, the count on which appellant was convicted (14).

Short was, at the times mentioned in the Indictment, an employee of the Pinal County Agricultural Stabilization and Conservation Committee. Appellant was, during said times, a farm operator.

Defendant Short was convicted on all counts in which he was charged, either individually or jointly with appellant, except Count XII, the conspiracy count. Appellant Neely was acquitted on all counts in which he was charged, either individually or jointly with Short, except Count V (tendering a bribe (18 U.S.C.A. 201) (6)).*

Appellant duly filed a motion to dismiss the Indictment and each and every count thereof on the ground that each count was fatally defective in that it did not state facts sufficient to constitute an offense against the United States (16). This motion was filed on November 5, 1957, and was denied on November 27, 1957 (17).

After appellant's conviction on Count V, appellant filed motions in arrest of judgment and for a new trial (20, 21). These motions were filed on October 6, 1958, argued on October 27, 1958 (22), taken under advisement, and denied on December 29, 1958 (22, 23).

Judgment of conviction was entered on January 12, 1959, and the defendant sentenced to pay a fine of \$1,000.00 (23).

*Figures in parentheses refer to pages in printed transcript of record.

The court entered an order fixing bail pending appeal, and a cash bond was given (24, 25).

A notice of appeal by appellant was filed January 12, 1959 (26, 27).

BASIS OF JURISDICTION

The District Court had jurisdiction by virtue of the nature of the case inasmuch as the offenses charged in the Indictment were against the laws of the United States (Title 18, U.S.C.A., Section 3231, 62 Stat. 826).

This Honorable Court of Appeals has jurisdiction because this is an appeal from a final decision of a District Court of the United States, and such an appeal is expressly authorized by the provisions of Title 28, U.S.C., Section 1291, 62 Stat. 929.

STATEMENT OF THE CASE

The Indictment.

Count V of the Indictment, on which appellant was convicted, charges in effect that on or about the 9th day of December, 1955, appellant, well knowing Short to be an employee of the Pinal County Agricultural Stabilization and Conservation Committee, an agency of the United States, and in such capacity charged with the duty of the proper administration of the cotton acreage allotment and marketing quota program of the United States, as the defendant well knew, did willfully and unlawfully tender to the said Joe L. Short a check in the amount of \$1,750.00, dated December 9, 1955, drawn on the Valley National Bank, Mesa, Arizona, signed by the appellant as drawer, and payable to the order of Short, with the intent to influence the said Short to act in his aforesaid official capacity in committing and allowing the commission of a fraud against the United States, to-wit: the procuring of a cotton

acreage allotment in excess of that to which the appellant was lawfully entitled under the cotton acreage allotment and marketing quota program of the United States (6).

In appellant's statement of points on which he intends to rely (509), it is claimed that Count V fails to state an offense against the United States. After a careful study of *Schneider v. United States*, 9 Cir., 192 Fed. (2d) 498, 500, appellant now waives that point.

The Facts.

Appellant met Short for the first time in 1954, when restrictions were again placed on cotton acreage (266, 373). Appellant was looking for additional acreage and was told to contact Short at the A.S.C. office in Casa Grande, Arizona, for further information with reference to a certain Burns farm (267). Appellant saw Short some time prior to March 20, 1954, and on that date gave him a check for \$1,620.00 upon the statement by Short that Burns had released the acreage for him to take care of because of insufficient water on the Burns farm (268). Appellant stopped payment on this check (defendant's Exhibit M in evidence) because appellant had understood that it was necessary to get a lease from the farmer and had been so advised by the manager of the Valley National Bank at Mesa (269, 270). Appellant saw Short again and stated that he would have to have a lease on the Burns farm as he understood that was the only way a cotton allotment could be transferred (270, 271). Short advised appellant that he would contact Burns and get a lease from him. Early in April, appellant received from Short a lease purportedly signed by Burns (Government's Exhibit 15 in evidence). The Burns signature on the lease was witnessed by Lena H. Andrews, at Short's suggestion (379, 427), and Short witnessed appellant's signature (272, 379). When the lease was received, appellant gave

Short another check (Government's Exhibit 14-A in evidence) in lieu of the one on which payment was stopped, for \$1,620.00, dated April 5, 1954, and payable to the order of Short (272). Appellant had no idea at the time that he got the Burns lease that it was not a bona fide lease. Appellant then received a cotton allotment with the additional Burns acreage added to the regular allotment (273).

The foregoing refers to the bribery charge in Count I in the Indictment covering the 1954 crop year. This is the genesis of Neely's dealings with Short. Count III charges bribery and covers the 1955 crop year. On Counts I and III, as before stated, appellant was acquitted. Count V covers the 1956 crop year. It is this count on which appellant was convicted.

We are, of course, only concerned in this appeal with Count V; although to understand the appellant's contentions here, it may be necessary that the testimony on Counts I and III covering the alleged bribery in connection with the 1954 and 1955 crop years be considered.

With reference to Count III, covering the 1955 crop year, Neely contacted Short at the ASC office and inquired if the Burns farm lease was going to be available for the 1955 crop year (277). Short advised Neely that it was available but for a lesser acreage, and said that the acreage would be 70.5 acres or 70.6 acres at \$20.00 an acre (278). On the 22nd day of November, 1954, after the discussion with reference to the 1955 allotment, Neely gave Short his check for \$1,410.00 (Government's Exhibit 14-B in evidence).

The Facts on Count V Upon Which Appellant Was Convicted.

It may be noted here that Short, on January 14, 1957, some nine months prior to the filing of the Indictment, made a signed statement witnessed by his attorney and by two

Special Agents of the United States Department of Agriculture. This statement was admitted in evidence as defendant's Exhibit "J" and is appended to this brief as Appendix 1.

On January 22, 1957, Neely gave a statement signed by him and witnessed by Doyle S. Kennedy and Lloyd N. Johnson, Special Agents of the United States Department of Agriculture. This statement was written up on January 22, 1957, by Special Agent Lloyd N. Johnson in his own handwriting and is said to be the gist of a conversation had with Neely (222). This statement was also admitted in evidence, as Government's Exhibit 25 and is appended to this brief as Appendix 2.

Later, on March 24, 1957, Special Agent Lloyd N. Johnson presented a typewritten statement to Mr. Neely. This statement was made from a lengthy tape recording (225, 226) which took five hours to play back, and purports to be a summary of same. Neely did not sign the statement, although he did make a few changes in same, as shown by the original Exhibit 24 in evidence. Johnson also prepared this statement for Mr. Neely to sign and stated that it was a summarization of the substance of his (Johnson's) conversations with Mr. Neely (241, 243). While the statement is dated March 24, 1957, the tape recording was taken some time before that (243), and the statement was written up by Agent Johnson subsequent to March 24 (244). This statement was likewise admitted in evidence as Government's Exhibit 24 and is appended to this brief as Appendix 3.

In the argument, *infra*, the contents of these statements will be discussed, together with pertinent evidence relating to Count V.

In December, 1955, Neely contacted Short at the ASC office and asked him about the availability of the allotment off the Burns farm for 1956. Short indicated that he would

have to see Mr. Burns and that Neely should contact Short later, which he did (290, 291).

At that time, he had nothing in his mind that would cause him to believe that it was not a bona fide transaction (291). The last allotment or lease was for 60 acres and at a price of \$25.00 per acre would have amounted to \$1,500.00. The check given Short on December 9, 1955 (Government's Exhibit 14-C), for 60 acres of cotton at \$25.00 per acre was, in fact, \$250.00 more than the \$1,500.00 computed for 60 acres at \$25.00 per acre. Neely's explanation of this is that he went to the office like on other occasions and asked Short about the Burns allotment lease and was advised that it would be \$25.00 per acre, and that he thought the cotton was worth more than he had been paying originally (304), to wit: \$20.00 per acre. He stated he knew at the time, through other employees in the office, that Short was going to have some hospital expenses for his wife, but that the primary reason was that the cotton base was worth more than the \$20.00 per acre that he had been paying (305).

Short testified that Neely asked him if he could get the Burns farm on this lease for the next year and that Short told Neely that he could but that the price was going up to \$25.00 per acre and that Neely gave him a check with the statement, "Well, that would be about \$1,500.00, after figuring out, or something like that, and he said, 'I understand that your wife is going to the hospital before long. I am making this \$1,750.00. The other \$250.00 is not to go to Burns. It is for you.'" Short then thanked Neely. This took place on December 9, 1955, the date of the check (403).

The testimony of Short with reference to this particular transaction coincides with Short's statement made on or about January 14, 1957, to Special Agents Cardon and Kennedy, as shown in Appendix 1 to this brief, and also

coincides with the statement given by Neely to Special Agent Johnson as shown in Appendix 3 to this brief.

QUESTION INVOLVED

The only question involved is: Was Count V sustained by evidence sufficient for the jury to say, beyond a reasonable doubt, that the defendant was guilty of wilfully and unlawfully and with corrupt intent tendering a bribe to Joe L. Short with intent to influence Short to act in his official capacity in committing and allowing the commission of a fraud against the United States?

Appellant is contending that there is no evidence, direct or circumstantial, showing intent, which is an essential element under Title 18, U.S.C.A., Section 201.

This question is raised in two specifications of error which will be argued together.

SPECIFICATIONS OF ERROR

I.

The lower court erred in denying appellant's motion for judgment of acquittal at the end of the Government's case and at the end of the entire case, as to Count V, because the evidence was insufficient to submit to the jury the question as to whether, beyond a reasonable doubt, there was any corrupt intent on the part of appellant to wilfully and unlawfully tender a bribe to Joe L. Short with intent to influence him to act in his official capacity in committing and allowing the commission of a fraud against the United States.

II.

The lower court erred and abused its discretion in denying appellant's motion for a new trial, based upon the grounds

that a judgment of acquittal should have been given at the close of all of the evidence, and upon the further ground that the verdict is not supported by substantial evidence, for the reason that there was no proof of corrupt intent on the part of appellant and that he did not, as charged in Count V, wilfully and unlawfully tender Joe L. Short the check for \$1,750.00 dated December 9, 1955, with intent to influence Short to act in his official capacity in committing and allowing the commission of a fraud against the United States, to-wit: the procuring of a cotton allotment for the defendant in excess of that to which the defendant was lawfully entitled under the cotton acreage allotment and marketing quota program of the United States.

ARGUMENT

The Verdict on Count V Is Unsupported by the Evidence.

I.

The lower court erred in denying appellant's motion for judgment of acquittal at the end of the Government's case and at the end of the entire case, as to Count V, because the evidence was insufficient to submit to the jury the question as to whether, beyond a reasonable doubt, there was any corrupt intent on the part of appellant to wilfully and unlawfully tender a bribe to Joe L. Short with intent to influence him to act in his official capacity in committing and allowing the commission of a fraud against the United States.

II.

The lower court erred and abused its discretion in denying appellant's motion for a new trial, based upon the grounds that a judgment of acquittal should have been given at the close of all of the evidence, and upon the further ground that the verdict is not sup-

ported by substantial evidence, for the reason that there was no proof of corrupt intent on the part of appellant and that he did not, as charged in Count V, wilfully and unlawfully tender Joe L. Short the check for \$1,750.00 dated December 9, 1955, with intent to influence Short to act in his official capacity in committing and allowing the commission of a fraud against the United States, to-wit: the procuring of a cotton allotment for the defendant in excess of that to which the defendant was lawfully entitled under the cotton acreage allotment and marketing quota program of the United States.

Appellant moved for judgment of acquittal on all counts with which he was charged in the Indictment, at the close of the Government's case (18, 262) and at the close of all of the evidence (18, 19, 482), and moved for a new trial (21). The motions were denied.

This is the only point on which appellant intends to rely, and the following covers both specifications of error.

In order that this Honorable Court will not confuse overplanting and failure to plow up an overplant as being crimes, suffice it to say that neither act is a crime. The court below so instructed the jury (500). The court below likewise instructed the jury that it was not against the law for appellant to lease land with a cotton allotment or to secure an additional cotton allotment (500).

Under the law (7 U.S.C.A. 1374, as amended August 28, 1954), it is provided, in subdivision (c) of that section, as follows:

"If the acreage determined to be planted to any basic agricultural commodity on the farm is in excess of the farm acreage allotment, the Secretary shall by appropriate regulations provide for a reasonable time *prior to harvest within which such planted acreage may be adjusted to the farm acreage allotment.*" (Emphasis ours.)

The regulations contained in paragraph 78, 1956 Cotton Handbook No. 5, pertaining to the 1956 cotton crop, provide:

*"Mailing and filing (MQ-93). The notices on MQ-93 prepared as outlined in paragraph 74A shall be mailed from the county office as soon as practicable after measurements from the farms are completed and time has been allowed to adjust excess acreage to the farm allotment * * *. The notices under paragraphs 75B and 75D shall be prepared and mailed as soon as practicable under the limitations set forth in such paragraphs. Every effort should be made to complete the mailing of notices under paragraphs 74A and 74B prior to the beginning of harvest * * *."*

Appellant never received notice of overplant before harvest nor at the time of the trial had he received any notice of penalty for overplanting (88, 111, 291).

Witnesses Mathis and Wolfe measured appellant's farm on Friday, December 28, 1956, after the harvesting (picking of the cotton) was practically completed (Appendix 3).

Under the law and regulations, *supra*, even a penalty for overplanting cannot be assessed unless, prior to the beginning of harvest, the farm operator is notified of the overplant so that he may adjust his excess acreage to the farm acreage allotment.

The only case that we have found construing the regulations and 7 U.S.C.A. 1374, subdivision (c), *supra*, is *United States v. Lynn*, from the District Court of the Eastern District of Kentucky, reported in 132 Fed. Sup. 605. This case had to do with a tobacco crop allotment and the court denied the United States the right to collect a penalty because the farmer had been denied the opportunity to protect himself from the penalty by means provided by the statute and regulations.

It will be noted that all of the payments by appellant set forth in Counts I, III, and V of the Indictment were by check. No other money was paid to Short except a \$10 measurement fee covering the 1955 crop (397). Appellant's entire case is based on the fact that he at no time knew what Short was doing and that at no time did he know that he was not getting an additional cotton allotment by virtue of the so-called Burns lease, which lease, by the way, was forged by Short under his own admissions (426). As stated before, appellant was acquitted on the bribery charges set forth in Count I (1954 crop year) and Count III (1955 crop year).

The only difference between Counts I and III and Count V is the fact that appellant made a gift to Short of an additional \$250, at which time he stated that the \$250 was not to go to Burns (403). In short, unless this gift of \$250 was shown by the Government to be something other than what it actually was under the testimony, there was no intent on the part of appellant to bribe Short (see 8 *Am. Jur.*, par. 6, page 888).

The statute under which appellant was indicted as to Counts I, III, and V, provides:

"Whoever * * * tenders any check, * * * to any officer or employee or person acting for or on behalf of the United States * * * in any official function, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may by law be brought before him in his official capacity, * * * with intent to influence him or to commit or aid in committing, or to collude in, or allow any fraud or make opportunity for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisonment not more than three years or both."

The Indictment charges, in Count V, that the appellant wilfully and unlawfully tendered the \$1,750.00 to Short with intent to influence Short in his official capacity. It is conceded that there is no direct evidence of intent on the part of appellant, nor is there any evidence of evil motive or bad purpose on the part of appellant to disobey or disregard the law. Intent cannot be presumed (*Tot v. United States*, 319 U.S. 463, 63 Sup. Ct. 1241), and there was no evidence of a circumstantial nature upon which the jury could say beyond a reasonable doubt that the payment by appellant of the \$1,750.00 to Short was for the purpose of corrupting Short and influencing his official action. In other words, it is our contention that the evidence definitely shows that appellant tendered the amounts of money set forth in Counts I, III, and V of the Indictment honestly and in good faith, believing that he was leasing the Burns farm and thereby securing a bona fide cotton allotment.

If this were a case where Short did the things he did for the purpose of entrapping Neely, we would have a perfect case of entrapment.

Sherman v. United States, 356 U.S. 369, 78 Sup. Ct. 819;

Robinson v. United States, (8 Cir.) 32 Fed. (2d) 505, 66 A.L.R. 468;

United States v. Klosterman, 248 Fed. (2d) 191, 194.

Before discussing the evidence or lack of it to show intent, we call attention of this Honorable Court to *Morissette v. United States*, 342 U.S. 246, 72 Sup. Ct. 240, in which it was held that, under a statute where one of the elements of the offense, is intent, that element cannot be presumed from the act but must be established not only from the act but also from defendant's testimony and all of the surrounding

circumstances. The statute under which appellant was convicted is not *malum prohibitum* but *malum in se*.

26 *Words and Phrases*, pages 343 to 348.

See also *United States v. Nedley, et al*, 3 Cir., 255 Fed. (2d) 350, 357.

"If a specific intent is an element of the crime charged, the doing of the act does not establish the existence of the intent, and the prosecution must present independent evidence of the intent." *Wharton's Criminal Evidence*, 12th ed., Vol. 1, page 244.

Likewise, and with reference to the \$250.00, which will be discussed later, the acceptance of a gift without corrupt prior understanding is not bribery.

Wharton's Criminal Law and Procedure, Vol. 3, pages 774, 775;

People v. Coffey, 161 Cal. 433, 119 Pac. 901;

22 *Corpus Juris Secundum*, paragraph 32, page 91;

8 *Am. Jur.*, par. 6, page 888.

We are not contending that intent cannot be proved by circumstantial evidence, but we do contend that there is no evidence, either direct or circumstantial, to show intent on the part of appellant to corruptly influence Short. Suspicion alone is insufficient to prove intent because criminal intent is an essential element of the crime of bribery. *United States v. Laboritz, et al*, (3 Cir.) 251 Fed. (2d) 393.

In connection with form 578, Government's Exhibit 11-D in evidence, covering the Neely farm, this form did not show the acreage at the time it was signed by Neely nor did it show any destroyed cotton (291).

It will be noted that defendant's Exhibit E, the marketing card for 1956 for short staple cotton, was issued by Pauline Golsten, an employee of the office, who signed H. L. Mathis' name to same by herself (86, 87, 88).

As before stated, the statement of Joe L. Short, the government employee in question, and the two statements of appellant, were introduced in evidence, Short's statement being defendant's Exhibit "J" in evidence; Neely's statement of January 22, 1957, being Government's Exhibit 25 in evidence; and Neely's statement of March 24, 1957, being Government's Exhibit 24 in evidence. These statements are attached to this brief as Appendices 1, 2, and 3, for the convenience of the court. These statements, taken from seven to nine months prior to the Indictment, when considered in connection with the oral evidence at the trial, in our minds show that appellant at no time intended to violate the bribery statute. In fact, defendant never had any suspicion that anything was out of kilter until December, 1956.

In Short's statement of January 14, 1957 (Appendix 1), he stated:

"During each of the three crop seasons mentioned above, I accepted money from cotton producers in exchange for obtaining additional cotton allotments for them. I led these producers to believe that I obtained such allotments either from my own farm or through a deal with other producers who had allotments which were unplanted. They trusted me and, as far as I know, they believed my representations.

"The names of the producers and the amounts they paid are as follows: Rex Neely paid me \$1,800.00, \$1,600.00, and \$1,750.00 for the 1954, 1955 and 1956 crop seasons respectively; Joe Ladd paid me \$3,900.00, and L. Welton Simmons paid me \$2,800.00, both for the 1956 crop season.

"As I now recall, Neely paid at the rate of \$25.00 per acre for the extra allotment I obtained for him for the 1954 crop, and at the rate of \$20.00 per acre for the extra allotment I got him for the 1955 crop, and although I wanted \$20.00 per acre for the 1956 extra allotment, which was to be about 60 acres, he gave me

\$1,750.00 because he knew I needed it, since my wife was going to have to go to the hospital. * * *

"All of the payments which I received from Neely, Simmons and Ladd were given to me in the form of bank checks, most of which I deposited directly to my account in the Valley National Bank at Casa Grande. In a few instances, I cashed the check and used at least part of the proceeds to pay off loans I owed my bank. I remember that I cashed the \$1,800.00 check Neely gave me in December 1953 or January 1954, and kept the cash. I think I finally deposited some of this cash in my account in April 1954. Also, I cashed the check for \$900.00 Ladd paid me in April 1956, retained \$200.00 in cash, and then deposited the remaining \$700.00 to my account. When Simmons paid me \$2,800.00 in about January, 1956, I think I redeemed bank loans with part of it and deposited \$1,000.00 of it in my account. There may have been other instances of a similar nature, but I do not now recall them. * * *

"With respect to the way I handled the County ASC Office records regarding these extra allotments, I procured the extra acres for Simmons from the County Reserve acreage and showed it on the listing sheet. For Neely, I have him a revised allotment notice, signed by a member of the County Committee, for the right number of acres, but did not enter it on the listing sheet, nor put a copy thereof in Neely's folder. Also, after Agent Kennedy left Casa Grande after being here in November 1956, I instructed H. L. Mathis, my assistant, to prepare a revised notice of allotment for Neely showing 360.7 acres instead of the 306.7 acres originally allotted him. A copy of this revised notice, dated December 1, 1956, was placed in Neely's folder. To obtain the extra acres for Ladd, I reconstituted his farm with a "reserve" farm (1956 serial number 595) which, while receiving cotton allotments for the past four years, actually was not a bona fide farm at all. Thus, by reconstituting it with Ladd's farm, I was able to transfer its allotment to Ladd. * * *

"In further connection with my dealings with Neely, I took occasion to examine nearly all of the cotton allotment files after Agent Kennedy had left Casa Grande in November 1956, and I noted that Neely's form 578 showed he was overplanted and that no cotton had been destroyed. I intended to visit his farm and find out about the matter, but before I could go out there, he came into my office on December 19, 1956. I asked him if he had plowed up his excess cotton and he said he had not. I asked him then why he had gotten his marketing card, and he said the office had given it to him. I told him that he had better measure the cotton then, and pay the penalty. To the best of my recollection, I believe that just after the measurements of the growing cotton had been made—possibly the latter part of July 1956—I saw from his old 578 that Neely was overplanted and I talked to him at that time and told him that he was more than 100 acres overplanted, and that he should plow it up. I do not now remember whether I then returned the form 578 to his folder, or retained it in my desk for a period of time before putting it back in the file. Also, I am unable to explain the entry of the figure '306.7' in Mathis' handwriting in the measured acreage column of the Control Register; while it is possible that after talking to Neely in July, 1956, I may have told Mathis that Neely would plow up the excess cotton, I am sure that I never told Mathis that it had been plowed up, because I didn't know whether or not it had. * * *"

In appellant's statement of January 22, 1957, (Appendix 2), he stated in effect that one Mike Watson, since deceased, told him that he thought Bill Burns had some additional acreage for cotton allotment available and that Short's name was mentioned in this connection; that he talked with Short and that Short thought something could be worked out. Appellant was somewhat hesitant at the time and asked Short if it was all right. Appellant was assured that it was and

that there was nothing wrong in obtaining this allotment. Appellant then stated:

"* * * I knew I was overplanted in 1956, but I didn't know how much. I never received a notice that I was overplanted. I went to the County ASC Office at Casa Grande in June or July 1956 to find out how much I was overplanted, but Short was not there and the other employees were unable to tell me because the form containing this information (CSS-578) was missing from my file. I intended all along to destroy a sufficient quantity of the poorer cotton to come within my allotment, but I did not do so because I could never find out how much it was necessary to destroy.

"I do not recall having discussed with Short or having been told by him in the summer of 1956 that I was overplanted. The first time this matter was mentioned to me by Short was on or about Dec. 19, 1956, when he told me he knew I was overplanted; I believe he said about 60 acres.

"I have examined with Agent Kennedy the information listed on Form CSS-578 as to the number of acres planted in 1956 to cotton in the fields indicated thereon and I confirm this information to the best of my recollection. I wish to state, however, that I do not recall having seen or noticed the figures representing the final measurements of my cotton planting at the time I signed this form on October 3, 1956, and received my marketing card.

"With respect to the Burns farm, I do not know its exact location, except that it is in the Coolidge Area, nor do I have any information with respect to its cotton allotments in 1954, 1955 and 1956.

"Although I was aware that before allotments from leased land could be planted on other land, a reconstitution was necessary, I was told by Short that he would combine the farms and take care of the necessary paper work. * * *"

In appellant's unsigned statement of March 24, 1957, prepared by Special Agent Johnson, and being purportedly a summary of a rather lengthy tape recording, appellant stated:

"In the fall of 1953, knowing that cotton acreage allotments would be in effect for the 1954 season, like many other farmers I was looking around for some extra cotton acreage. It was my understanding that under the program coming into effect, a farmer could obtain additional cotton acreage through procedures set out in the program provisions. In this connection, an acquaintance, Mike Watson, now deceased, suggested that I contact Joe Short at the ASC office in Casa Grande.

"I thereafter talked to Short, with whom I had not previously been well acquainted, but whom I had seen in the office, and he said that he believed something could be worked out. Later, he told me that he could get about 80 acres for me from a farm in the Coolidge area where there was a shortage of irrigation water and cotton allotments on some of the farms there were being released for planting elsewhere in order not to lose their cotton history. It was my understanding that a lease of the land was required in connection with the transfer of allotments, and I told Short that if he could get a lease for the farm having about 80 acres of cotton allotment, I would take it. Short set the price at \$20 per acre for the allotment and said he could get 81 acres for me. I gave him a check to cover the 81 acres, although, as will be set out later, I am not sure it was the above-mentioned check dated April 5, 1954. At the time I gave Short the check, he presented the above-mentioned lease which I signed in his presence, and which already had the name 'W. R. Burns' affixed thereto as lessor.

"In connection with this transaction with Short, he gave me to understand that he was handling the lease of the farm for Burns. I do not recall exactly what was said about this. However, I do remember that I

stopped payment on the check immediately after I had given it to Short and had the lease in my possession because I was somewhat suspicious in the matter and wanted to do some checking. I talked with a number of farmers and other individuals, whose names I do not now recall, about Short and about whether I had followed the proper procedure in obtaining the additional acreage. Also, I went to my bank, the Valley National Bank, Mesa, to explain why I had stopped payment on the check and there I talked to W. J. Asher, Manager, and as I recall, when I told him I had a lease he said that it should be all right. I also talked to Short again about the legal aspects, that is, the program provisions, and as to whether under the terms of the lease I would have to farm the Burns tract. He indicated I would not have to do anything on the Burns farm and upon receiving assurance from him that everything was regular, I let the check go through, or issued another one to him, I am not sure which.* * *

"In the fall of 1955, about the time the 1956 allotment notices were being sent out, I spoke to Short about the availability of the Burns acreage for 1956. Short indicated that there would be 60 acres available and I gave him the above-listed check for \$1,750, dated December 9, 1955 at the ASC office. I did not request a lease in connection with this transaction, and I do not recall that the matter of a lease was even mentioned. To the best of my recollection at this time, the rate asked by Short for 1956 was \$25 per acre, and I added \$250 to the check to assist Short with hospital expenses, as I had heard that his wife was going to have an operation. I was willing to pay the higher price per acre because I felt that the allotment was worth more in 1956 than I had been paying.

"I have been shown a Form 578, Report of 1956 Acreage, for my Pinal County farm on which are entered the measured acres of short staple cotton in the various fields, with a total of 477.7 final measured acres being indicated. There are no figures represent-

ing destroyed cotton on this form. It bears my signature opposite the date October 3, 1956. I have no reason to question the accuracy of the total measured acres shown on this form for 1956. * * *

"I did not see Short until about the middle of December 1956, which I now understand was December 19. I was not called into the office by anyone on that date, but had gone there to ask about the soil bank and my 1956 ACP payment. Short was there at that time and he reminded me that I was overplanted and asked me if I had plowed up any cotton. He said that there was an investigation going on and that I had better request a measurement and pay the penalty on the excess cotton. However, I did not plow up any cotton after talking to Short on the 19th because I had already started the second picking by that time and it was then too late.

"On a later date which I believe was December 28, 1956, Mathis and Ray Wolf came out where we were picking cotton and said that they were going to measure my farm. I asked them why they were going to measure and they indicated that it was being done because of my being overplanted and failure to destroy any cotton. I recall that I asked them if they had seen Short, as I wanted to know whether or not they knew about the 60 acres of extra allotment I had obtained from him. I do not believe that the matter of a lease was mentioned at that time. A few days later, I believe it was on the following Sunday, I went to Casa Grande to see Mathis and find out what the results of the measurements were. I mentioned to Mathis and Wolf, who also was there, that I had a lease for 60 additional acres of allotment. Mathis only said that they would like to see it. They said that their measurements were close to those shown on the Form 578, but they did not say what I should do about the overplanting. After that I believed it was too late to do anything, as the cotton was practically all picked and marketed.

"To the best of my recollection, the next time I saw Short was at his home on the day he resigned (Decem-

ber 28, 1956). I had heard that he had been to Phoenix and I wanted to find out what the situation was regarding the investigation and what I should do about my overplanting and paying penalty. Short at that time said he had resigned from his ASC office position on that same day. He indicated that he did not know what was going to happen. He did not say anything about me getting a measurement nor anything about me being in any kind of trouble. * * *

“* * * In my dealings with Short from the beginning I had not thought of these implications until the meeting with him at Chandler when he mentioned bribery. I did not know that Short was not acting in good faith in these matters. I never thought of myself as being in a position at any time to bring pressure upon him to make it possible, through his connection with a Government office, for me to overplant and not have to destroy excess cotton or to take other advantages. * * * ”

From the oral evidence at the trial, and from the statements, it seems to us that the Government has failed to prove that appellant “did wilfully and unlawfully tender to said Joe L. Short a check * * * with intent to influence the said Joe L. Short to act in his aforesaid official capacity in committing and allowing the commission of a fraud against the United States * * * ” (6).

The motion for a new trial should have been granted on the grounds set forth, to-wit: a denial of appellant’s motion for acquittal made at the conclusion of all of the evidence and the fact that the verdict was not supported by substantial evidence (21).

The checks tendered Short were not given him in his official capacity but merely for the purpose of getting an additional cotton allotment under the so-called Burns lease. There is no evidence in the record sufficient to prove beyond

a reasonable doubt or at all that appellant wilfully and with corrupt intent influenced Short in his official capacity. In fact, the evidence is to the contrary. The crime of tendering a bribe cannot be committed in the absence of knowledge on the part of the appellant or in the absence of a corrupt intent. As stated in *Ingram v. United States*, U.S., 79 Sup. Ct. 1314, at page 1320 (decided June 29, 1959), quoting from *Direct Sales Co. v. United States*, 319 U.S. 711, 63 Sup. Ct. 1269:

“ ‘Without the knowledge, the intent cannot exist * * *. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal * * *. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes.’ ”

In the *Ingram* case, *supra*, it was held that even a conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself. In that case, the court held that the motions for acquittal of two of the named defendants should have been granted by the District Court and that the Court of Appeals was in error in affirming their convictions.

It will be noted that appellant was acquitted of the conspiracy count, which embraces not only the 1955 payment to Short for the 1956 cropping year but also the other payments, as well as other matters unnecessary to discuss here.

CONCLUSION

We respectfully submit that no corrupt intent is shown by the evidence; that this court should reverse this case and itself grant a judgment of acquittal or, in the alternative, grant a new trial as to Count V.

Respectfully submitted,

LOUIS B. WHITNEY

LORETTA WHITNEY

PAUL W. LAPRADE

810 Luhrs Tower

Phoenix, Arizona

Attorneys for Appellant

(Appendices Follow)



Appendix 1

Eloy, Arizona

January 14, 1957

I, Joe L. Short, residing near Casa Grande, Arizona, make the following statement to Reed S. Cardon and Doyle S. Kennedy who have identified themselves to me as Special Agents of the United States Department of Agriculture, Commodity Stabilization Service, Compliance and Investigation Division, knowing that it may be used in evidence. This statement is being made in the presence of, and with the consent of, my attorney, W. A. Stanfield of Eloy, Arizona, and is given freely, and voluntarily on my part, without any threats or promises of reward or immunity from prosecution.

During the crop seasons of the years of 1954, 1955, and 1956, I was manager of the Pinal County ASC office in Casa Grande, Arizona. I resigned from this position on December 28, 1956. In September 1956, I suffered a cerebral stroke which caused me to be away from the office most of the time up to the date of my resignation. In setting out the details below I shall be as accurate as I can.

During each of the three crop seasons mentioned above, I accepted money from cotton producers in exchange for obtaining additional cotton allotments for them. I led these producers to believe that I obtained such allotments either from my own farm or through a deal with other producers who had allotments which were unplanted. They trusted me and, as far as I know, they believed my representations.

The names of the producers and the amounts they paid are as follows: Rex Neely paid me \$1,800.00, \$1,600.00, and \$1,750.00 for the 1954, 1955 and 1956 crop seasons respectively; Joe Ladd paid me \$3,900.00, and L. Welton Simmons paid me \$2,800.00, both for the 1956 crop season.

As I now recall, Neely paid at the rate of \$25.00 per acre for the extra allotment I obtained for him for the 1954 crop, and at the rate of \$20.00 per acre for the extra allotment I got him for the 1955 crop, and although I wanted \$20.00 per acre for the 1956 extra allotment, which was to be about 60 acres, he gave me \$1,750.00 because he knew I needed it, since my wife was going to have to go to the hospital.

With respect to the payment from Simmons, I believe I charged him at the rate of \$50.00 or \$55.00 per acre for the extra allotment of the 1956 crop acreage.

My deal with Joe Ladd was different. He came to me and said if I could get an extra allotment—say 60 acres—he could get the land from a landlord who would want one-fifth of the profits for the rental of the land, and that he (Ladd) then would raise the crop and split the remaining profits with me. In other words, the profits would be divided this way: one-fifth to the landlord, two-fifths to Ladd, and two-fifths to me. I got the allotment for Ladd, and up to this time he has paid me a total of \$3,900.00 as follows: \$900.00 in April 1956, \$500.00 in September 1956, after my cerebral stroke and \$2,500.00 in the latter part of 1956. I don't know if there is any more due me under our agreement, since I have not examined Ladd's books.

All of the payments which I received from Neely, Simmons and Ladd were given to me in the form of bank checks, most of which I deposited directly to my account in the Valley National Bank at Casa Grande. In a few instances, I cashed the check and used at least part of the proceeds to pay off loans I owed my bank. I remember that I cashed the \$1,800.00 check Neely gave me in December 1953 or January 1954, and kept the cash. I think I finally deposited some of this cash in my account in April 1954. Also, I cashed the

check for \$900.00 Ladd paid me in April 1956, retained \$200.00 in cash, and then deposited the remaining \$700.00 to my account. When Simmons paid me \$2,800.00 in about January 1956, I think I redeemed bank loans with part of it and deposited \$1,000.00 of it in my account. There may have been other instances of a similar nature, but I do not now recall them.

At this point, I would like to state that during the time I was manager of the Pinal County ASC Office, the three men named above, Neely, Simmons and Ladd, are the only persons who paid me in any manner to secure additional cotton allotments for them. Also I would like to state that it is common practice in Pinal County, in arriving at the value of a farm for cash lease purposes, to consider each acre of the farm's cotton allotment to be worth approximately one hundred dollars. In the outright purchase of farm land, the cotton allotment is valued at about one thousand dollars per acre.

With respect to the way I handled the County ASC Office records regarding these extra allotments, I procured the extra acres for Simmons from the County Reserve acreage and showed it on the listing sheet. For Neely, I have him a revised allotment notice, signed by a member of the County Committee, for the right number of acres, but did not enter it on the listing sheet, nor put a copy thereof in Neely's folder. Also, after Agent Kennedy left Casa Grande after being here in November 1956, I instructed H. L. Mathis, my assistant, to prepare a revised notice of allotment for Neely showing 360.7 acres instead of the 306.7 acres originally allotted him. A copy of this revised notice, dated December 1, 1956, was placed in Neely's folder. To obtain the extra acres for Ladd, I reconstituted his farm with a "reserve" farm (1956 serial number 595) which, while receiving cotton

allotments for the past four years, actually was not a bona fide farm at all. Thus, by reconstituting it with Ladd's farm, I was able to transfer its allotment to Ladd.

Both H. L. Mathis and Ray Wolf, who is a member of the Arizona State ASC Office staff, as well as Paul B. Hanna Jr. and V. E. Morris, Jr., have known about the "reserve" or dummy farm (#595) for at least the last year and a half. I had discussed this farm with them and had told them not to do anything about it, saying that anything to be done about it would be done by me.

With respect to the notice of allotment forms (MQ-24), I maintained a supply of them signed in blank by a member of the County ASC Committee—sometimes I kept the supply and sometimes I turned them over to H. L. Mathis. These forms were signed in blank by either J. E. Beggs, Henry Haley or Rodney Elsberry, who comprised the committee. The having of such signed forms expedited the work in the office, since when a farm was combined or the allotment revised, the farmer would need the signed notice of such allotment in order to make his financing arrangements, and if there was no committee member available for signing it, I would use one that had been signed in blank.

In further connection with my dealings with Neely, I took occasion to examine nearly all of the cotton allotment files after Agent Kennedy had left Casa Grande in November 1956, and I noted that Neely's form 578 showed he was overplanted and that no cotton had been destroyed. I intended to visit his farm and find out about the matter, but before I could go out there, he came into my office on December 19, 1956. I asked him if he had plowed up his excess cotton and he said he had not. I asked him then why he had gotten his marketing card, and he said the office had given it to him. I told him that he had better measure the

cotton then, and pay the penalty. To the best of my recollection, I believe that just after the measurements of the growing cotton had been made—possibly the latter part of July 1956—I saw from his form 578 that Neely was overplanted and I talked to him at that time and told him that he was more than 100 acres overplanted, and that he should plow it up. I do not now remember whether I then returned the form 578 to his folder, or retained it in my desk for a period of time before putting it back in the file. Also, I am unable to explain the entry of the figure “306.7” in Mathis’ handwriting in the measured acreage column of the Control Register; while it is possible that after talking to Neely in July 1956, I may have told Mathis that Neely would plow up the excess cotton, I am sure that I never told Mathis that it had been plowed up, because I didn’t know whether or not it had.

With respect to the County ASC Office records for the 1956 crop year for the two farms operated by John E. Beggs, Chairman of the Pinal County ASC Committee, this is what happened. After the survey crew had measured these farms, Beggs, who had been spending the summer in the northern part of Arizona, came to me around the first part of July 1956, and asked if the measurements showed that he had too many acres planted. I got the forms 578 for his two places and told him he was overplanted on both farms on both short staple and long staple. I asked him where he was going to plow up the cotton and he designated the fields and the acreages in each he intended to destroy, and I entered these figures on the forms 578 which then brought the totals into compliance with the allotments, and retained these forms in my desk drawer. I told Beggs that he then would have to go out to his farms and leave instructions with his employees for the plowing up, and then that

we would measure the destroyed cotton later. I cannot now recall if later I ever asked Beggs if the acreages actually had been destroyed, or if he ever told me they had been. No notices of the overplantings (MQ-94) were sent to Beggs since I knew he came into the office about once every ten days and I could inform him orally. I am unable to explain why the entries in the "measured acreage" column on the Control Register reflect the reduced acres I entered on the forms 578, rather than the actual measurement figures. Also, I am unable to explain why our records show that on August 13, 1956, Beggs was sent forms MQ-93 advising that he was within his allotted acreages, when actually he had destroyed no cotton, unless it was because that by then I had returned to the files the above forms 578 which incorrectly showed such destruction. I believe I handled Beggs' records for the 1955 crop in the same manner.

With respect to Henry Haley, Vice-Chairman of the 1956 Pinal County ASC Committee, there are two different incidents for me to describe: one having to do with \$100.00 he gave me, and the other in connection with his farming operations. In July 1956, I believe, Haley called me one evening at home and said he would like to see me. When he came out, he said he had \$100.00 to give me, and I asked why. He said some farmer had told him that if the County ASC Office did something, he was going to give the office manager that amount. Haley declined to tell me the farmer's name or what the service was, but he did indicate the county office already had done it, and then Haley gave me a one hundred dollar bill. I still don't know what the payment was for.

In regard to Haley's farming operations, I had the survey crew measure both of his places during the last of June or the first part of July 1956. Then I believe that in the last

part of July I talked with Haley about the results of the measurements and pointed out to him that he was underplanted some 30 acres on one place (#605) and overplanted on his other place (#1091). He asked me if he could put the 30 acres underplanted into the soil bank, and I told him he could. I asked him what he was going to do about the overplanting on his other place and he said he was going to plow it up. I made out his soil bank work sheet on July 25, 1956, and in connection with its preparation I again reminded him that he was overplanted on his other place and would have to destroy that excess cotton. Also, Haley had asked me what would be the effect of combining his two farms. I had asked Mathis to make out a worksheet and figure out the combination. I don't recall if Mathis ever told me whether the farms should be combined or left alone. With respect to the soil bank payment made to Haley in October 1956, I was in the hospital at that time and Mathis prepared the draft. I do know that I had told both Mathis and Wolf to check and double check for compliance with all allotment acreage requirements before preparing soil bank payments. Also I am sure I did not tell Mathis that Haley had plowed up his excess cotton, because I did not know, myself, whether or not he had.

The Casa Grande Country Club had a farm history until the 1954 crop season, when it was converted into a golf course. However, it has been the custom for the County ASC Committee to continue its cotton allotment and show it on the listing sheet since that time. I understand this allotment has been auctioned off to the highest bidder each year since. The buyer doesn't come to me, but instead Beggs tells me who bought it and I make the necessary entries in the records to transfer the allotment to the purchaser. We call this a "release and reapportionment—unofficial." Beggs,

who is a member of the Casa Grande Country Club, was the Committee member who told me to make the changes each year,—that is, the 1954, 1955 and 1956 crop seasons. I think Beggs may have talked about it to the other two committee members the first year, but after that I don't believe he did. Carl Teeter, Administrative Officer of the Arizona State ASC Committee, knows about it now, because I told him about it last week. I believe his only comment was, "Release and reapportionment,—unofficial". I don't know if he knew about it before last week. I believe the price paid the country club by the purchaser of the 1956 allotment was at the rate of \$160.00 per acre.

In connection with the payments I received from the three producers discussed earlier in this statement—Neely, Ladd and Simmons—I have with me some, but not all, of my bank statements for the years 1954, 1955 and 1956, and I will try to identify thereon the deposits of these monies.

In my Valley National Bank statements covering the period January 26, 1954 through April 10, 1954, I believe the deposit of \$600.00 on April 7, 1954 represents part of the \$1,800.00 paid me that year by Neely. The deposit of \$1,750.00 on December 12, 1955, set out in my bank statement covering the period November 25, 1955 through December 23, 1955, represents Neely's payment to me for the 1956 crop year. The statement for the period January 24, 1956 through February 23, 1956 shows a deposit of \$1,000.00 on January 31, 1956, and as explained hereinbefore, represents a portion of the \$2,800.00 paid me by Simmons for the 1956 crop year. The \$700.00 deposit on my statement for March 27, 1956 to April 23, 1956 inclusive, as explained earlier, is part of a \$900.00 check paid me by Ladd during the 1956 crop year. Also, Ladd paid me the \$500.00 shown deposited on September 11, 1956 in my bank statement covering the

period August 28, 1956 through September 24, 1956. I am unable at this time to identify any other similar deposits on the bank statements I have with me, but the bank will have a complete record and I will attempt, at a later date, to identify others.

The above statement consisting of eight typewritten pages has been read to me and it is true to the best of my knowledge and belief. My attorney, W. A. Stanfield also has read this statement in my presence. I have been given the opportunity to make any additions, changes or deletions that I desired.

JOE L. SHORT

Joe L. Short, Casa Grande, Arizona

Witnesses:

W. A. STANFIELD

W. A. Stanfield, Eloy, Arizona

REED S. CARDON

Reed S. Cardon

DOYLE S. KENNEDY

Doyle S. Kennedy

} Special Agents, USDA, CSS, C & I Div.,
1000 Geary Street, Room 101
San Francisco, California

Appendix 2

Chandler, Arizona
January 22, 1957

I, Rex L. Neely, make the following statement freely and voluntarily to Doyle S. Kennedy and Lloyd N. Johnson who have identified themselves to me as Special Agents of the Compliance and Investigation Division, CSS, U. S. Department of Agriculture. This statement is given without threats, or promises of immunity, and I am aware that it may be used in evidence.

In connection with the 1954 cotton crop year I was looking around for additional acreage with cotton allotment. Mike Watson (since deceased) told me he thought Bill Burns had some available. I believe that he mentioned Joe Short's name in this connection. I talked to Short and he said that something could be worked out. I was somewhat hesitant at the time and asked Short if it was all right. He assured me that it was and that there was nothing wrong in obtaining this allotment.

To the best of my recollection, Short said that Burns wanted \$20 or \$25 per acre for the allotment. I told him that if he could get a lease on that basis I would take it, and he got it for me. I never saw Burns, but his name, as well as Short's name, appears on this lease.

As I now recall, the cotton allotment available on this leased land for 1954 was 80 acres. I made out my personal check to Joe Short in payment. There was only the one lease. Short notified me orally as to the amount of allotment available in 1955 and 1956 and I gave him my personal checks covering 70 acres in 1955 and 60 acres in 1956. Without examining my records, I am unable to state in what amounts the checks were issued or at what rates. I made no payments to Short other than for the acreages

for these three years. I paid a higher rate for the 1956 allotment because I believed it was worth more.

As far as I know, I never received any notices of allotment on these leased acreages.

Taking the lease into consideration, I was not overplanted in 1955 crop year. I knew I was overplanted in 1956, but I didn't know how much. I never received a notice that I was overplanted. I went to the County ASC Office at Casa Grande in June or July 1956 to find out how much I was overplanted, but Short was not there and the other employees were unable to tell me because the form containing this information (CSS-578) was missing from my file. I intended all along to destroy a sufficient quantity of the poorer cotton to come within my allotment, but I did not do so because I could never find out how much it was necessary to destroy.

I do not recall having discussed with Short or having been told by him in the summer of 1956 that I was overplanted. The first time this matter was mentioned to me by Short was on or about Dec. 19, 1956 when he told me he knew I was overplanted; I believe he said about 60 acres.

I have examined with Agent Kennedy the information listed on Form CSS-578 as to the number of acres planted in 1956 to cotton in the fields indicated thereon and I confirm this information to the best of recollection. I wish to state, however, that I do not recall having seen or noticed the figures representing the final measurements of my cotton planting at the time I signed this form on October 3, 1956, and received my marketing card.

With respect to the Burns farm, I do not know its exact location, except that it is in the Coolidge Area, nor do I have any information with respect to its cotton allotments in 1954, 1955 and 1956.

Although I was aware that before allotments from leased land could be planted on other land, a reconstitution was necessary, I was told by Short that he would combine the farms and take care of the necessary paper work.

I have read the foregoing statement consisting of five hand-written pages and it is the truth to the best of my knowledge and belief. I have been given an opportunity to make changes and corrections.

(signed) REX L. NEELY

Witness :

(signed) DOYLE S. KENNEDY

(signed) LLOYD N. JOHNSON

Special Agents, Compliance & Investigation
CSS, U. S. Dept. of Agriculture Div.
San Francisco, Calif.

Appendix 3

Chandler, Arizona

March 24, 1957

I, Rex L. Neely, make the following statement freely and voluntarily to Lloyd N. Johnson who has identified himself to me as a Special Agent of the Compliance and Investigation Division, CSS, U. S. Department of Agriculture. The statement is made without threats and without promises of immunity, and I am aware that it may be used in evidence.

I am furnishing this information in connection with the investigation being conducted concerning the cotton acreage allotment and agricultural conservation programs as they pertain to my farming operations, and concerning which I have made available the three cancelled checks which I had issued to Joe L. Short, former manager of the Pinal County ASC Office at Casa Grande, Arizona, to cover extra cotton acreages obtained from Short for the 1954, 1955 and 1956 crop years, together with other records, as follows:

Check No.	Date	Amount
942	4-5-54	\$1,620.00
1072-A	11-22-54	1,410.00
1978	12-9-55	1,750.00

A one-year lease, dated March 30, 1954, covering a 160-acre farm, executed in my favor by the lessor, W. R. Burns, for the period to March 1, 1955.

Cotton allotment notices and revisions thereto for my Pinal County farm, as follows:

Short Staple:

Crop Year	Date of Notice	Acres
1954	12-11-53	252.2
1954	2-16-54	319.8
1954	3-19-54	400.8
1955	11-12-54	306.1
		70.6 (in ink)
1956	12- 1-55	306.7

Extra Long Staple:

1955	3- 3-55	3.8
1956	12- 1-55	1.6

Also, I have been asked to explain the circumstances under which the above payments were made to Short, who was known to me at the time they were made as an official of the U. S. Department of Agriculture in a responsible administrative position, with access to official records having to do with Government programs handled through the Pinal County ASC Office. My explanations are set out hereinafter.

1954 Crop Year.

I am 31 years of age, married, and have lived all of my life in the Chandler-Gilbert area, Maricopa County, Arizona, and prior to 1953 I had farmed on land owned by my father and on land leased by me from others in Maricopa County, raising cotton and other crops. In the spring of 1953, I purchased a section of land in Pinal County, near the town of Maricopa. In the fall of 1953, knowing that cotton acreage allotments would be in effect for the 1954 season, like many other farmers I was looking around for some extra cotton acreage. It was my understanding that under the program coming into effect, a farmer could obtain additional cotton acreage through procedures set out in the program provisions. In this connection, an acquaintance, Mike Watson, now deceased, suggested that I contact Joe Short at the ASC office in Casa Grande.

I thereafter talked to Short, with whom I had not previously been well acquainted, but whom I had seen in the office, and he said that he believed something could be worked out. Later, he told me that he could get about 80 acres for me from a farm in the Coolidge area where there was a shortage of irrigation water and cotton allotments on some of the farms there were being released for planting elsewhere in order not to lose their cotton history. It was my understanding that a lease of the land was required

in connection with the transfer of allotments, and I told Short that if he could get a lease for the farm having about 80 acres of cotton allotment, I would take it. Short set the price at \$20 per acre for the allotment and said he could get 81 acres for me. I gave him a check to cover the 81 acres, although, as will be set out later, I am not sure it was the above-mentioned check dated April 5, 1954. At the time I gave Short the check, he presented the above-mentioned lease which I signed in his presence, and which already had the name "W. R. Burns" affixed thereto as lessor.

In connection with this transaction with Short, he gave me to understand that he was handling the leasing of the farm for Burns. I do not recall exactly what was said about this. However, I do remember that I stopped payment on the check immediately after I had given it to Short and had the lease in my possession because I was somewhat suspicious in the matter and wanted to do some checking. I talked with a number of farmers and other individuals, whose names I do not now recall, about Short and about whether I had followed the proper procedure in obtaining additional acreage. Also, I went to my bank, the Valley National Bank, Mesa, to explain why I had stopped payment on the check and there I talked to W. J. Asher, Manager, and as I recall, when I told him I had a lease he said that it should be all right. I also talked to Short again about the legal aspects, that is, the program provisions, and as to whether under the terms of the lease I would have to farm the Burns tract. He indicated I would not have to do anything on the Burns farm and upon receiving assurance from him that everything was regular, I let the check go through, or issued another one to him, I am not sure which.

I have been shown Form 578, Report of 1954 Acreage, on which is entered a total of 388 measured acres of short staple cotton for my farm. The measured acres thus indicated were within my 1954 allotment of 400.8 acres. I received a marketing card for the 1954 crop, marked "eligible".

I ginned my 1954 crop of cotton at the Chandler Gin Company, Chandler, Arizona. This company is a corporation in which I am a stockholder, the stock being owned by a group of farmers in the Chandler area.

1955 Crop Year.

About the time when the 1955 allotment notices were being sent out, I contacted Short at the ASC office and asked him if the Burns cotton acreage was going to be available for the 1955 crop year. He said he believed it would be and that he would find out and let me know, but that he did not think it would be for as many acres as it was in 1954. When I saw him later he told me there were 70.5 acres available and I gave him my check, the one listed above for \$1,410.00, dated November 22, 1954. This transaction took place at the ASC office and I believe it was on the date shown on the check.

I did not get a lease for this 1955 acreage and to the best of my recollection a lease was not mentioned. However, I assumed that I would get a lease and fully expected that, even though it was not mentioned at the time I paid Short, he would go ahead and handle it the same way as before with a written lease. However, nothing was later said about it, either by him or by me. In speaking to Short about the extra cotton acreage for 1955, I specifically referred to it as the "Burns" acreage or allotment. He implied at that time that he was still handling the farm for Burns.

With respect to the hand-written figure "70.6" which has been entered directly under the typed allotment figure of 306.1 on my copy of the 1955 notice, I have no knowledge as to who wrote the figure there or when or under what circumstances it was done. The only possible explanation I can think of at this time is that after giving my check to Short for the 1955 extra allotment, I may have had this notice with me when talking to him and he may have placed the figure there to represent the additional allotment I had purchased.

I have examined the Form 578, Report of 1955 Acreage, for my farm on which are entered the measured acres of short staple cotton in the various fields, with the total 426.5 acres. Also entered on this form in red hand-writing is the figure "120.4" under the heading "Destroyed", opposite field No. 2 "S/S Cotton (Stub)", and red figures representing final acres, totaling 306.1 acres, which agrees with my 1955 regular farm short staple allotment. I also recognize my signature on this form opposite the date August 18, 1955.

I recall that Short presented this form for me to sign in the ASC office, and gave me my marketing card. I do not recall having seen or particularly noticed the total measured acres as indicated—426.5. They were no doubt there, but I probably signed in a hurry and did not examine them. I specifically recall not having seen the destroyed and final figures on this form at the time I signed it. The information on this form as to destroyed acres is not correct, as I did not destroy 120.4 acres, and particularly in that one field. Furthermore, the cotton in this field, No. 2, was not stub cotton, as I have never grown cotton from stalks or stubs on my farm. Actually I destroyed no more than a total of 15 acres of cotton that year.

I have questioned the accuracy of the figure representing the total measured acres on this form—426.5, since I thought

I had planted about 380 acres of short staple in 1955. However, Agent Johnson has indicated to me that my farm was measured twice in 1955, once by the regular measuring crew, and again later by the supervisor of the measuring crews, and that the figure is substantially correct.

With respect to destroying cotton on my Pinal County farm in 1955, I knew I was overplanted and would have to plow up some cotton, but I never received an overplant notice from the ASC office. When I went to the office on August 18, 1955, the date of the Form 578, Short told me that I was overplanted and that I would have to destroy some cotton, but I do not recall that he gave me a figure, or told me just how much to destroy. I did know in 1955 that it was necessary to sign the Form 578 before a marketing card would be issued to me. To the best of my recollection, on August 18, 1955, Short got the Form 578 out of the file and I signed it and he gave me my short staple marketing card, and at that time he told me that I had to destroy some cotton. I told him I would and on the same date I went back to my farm and by discing out some poor spots and squaring the ends, I destroyed about 15 acres which I believed was sufficient to bring me within my allotment, including the 70.5 extra acres I had obtained.

I do recall that on the date I got my marketing card from Short, I gave him \$10.00 in cash which was the ASC office fee for remeasuring after reporting the destruction of excess cotton. I do not recall having seen Short or anyone else on my farm to check on the destroyed cotton after that date. There was no arrangement between Short and me that I would pay the measuring fee just for the record and then not destroy the cotton.

In 1955 I had a short staple allotment of about 70 acres on my other farm which I operated in Maricopa County,

located near Chandler. I was overplanted on that farm in 1955 and did not obtain a marketing card until in February 1956 when I paid the penalty on the excess. In the meantime during the fall ginning season I marketed all of my cotton grown in both counties on my Pinal County marketing card. I have no reasonable explanation as to why I did not promptly destroy the excess cotton after receiving an overplant notice, or why it took so long for me to get around to paying the penalty. I knew that all of my cotton was being ginned at the same gin, the Chandler Gin Company, and that I had an eligible card from Pinal County, and that all of the cotton from both counties was being marketed on the Pinal County marketing card. I knew this was not in accordance with the regulations.

With respect to Extra Long Staple or Pima cotton, I received a new farm allotment of 3.8 acres in Pinal County for 1955. I have been shown a form 578, Report of 1955 Acreage, for my farm which bears my signature opposite the date August 18, 1955, and shows a total of 5.6 measured acres, with 1.8 acres destroyed, leaving 3.8 final acres, which agrees with my Pima allotment notice.

To the best of my recollection, I planted about 5.6 acres of Pima in 1955. When I signed the Form 578 and obtained my marketing card from Short, I do not believe the figure "1.8" representing destroyed cotton, nor the final figure "3.8", were on the form. I do recall that Short said I was overplanted in Pima, and that he told me to destroy some Pima cotton in 1955. I did not destroy any Pima in 1955.

I had this Pima cotton ginned at the Tempe, Arizona, Community Gin Company and placed it under Government loan myself. In placing it under loan, it did not occur to me that there might be an irregularity, as I did not connect up the overplanting with the loan.

1956 Crop Year

In the fall of 1955, about the time the 1956 allotment notices were being sent out, I spoke to Short about the availability of the Burns acreage for 1956. Short indicated that there would be 60 acres available and I gave him the above-listed check for \$1,750.00, dated December 9, 1955 at the ASC office. I did not request a lease in connection with this transaction, and I do not recall that the matter of a lease was even mentioned. To the best of my recollection at this time, the rate asked by Short for 1956 was \$25.00 per acre, and I added \$250.00 to the check to assist Short with hospital expenses, as I had heard that his wife was going to have an operation. I was willing to pay the higher price per acre because I felt that the allotment was worth more in 1956 than I had been paying.

I have been shown a Form 578, Report of 1956 Acreage, for my Pinal County farm on which are entered the measured acres of short staple cotton in the various fields, with a total of 477.7 final measured acres being indicated. There are no figures representing destroyed cotton on this form. It bears my signature opposite the date October 3, 1956. I have no reason to question the accuracy of the total measured acres shown on this form for 1956.

I knew I was considerably overplanted in 1956. I never received an overplant notice. I went to the ASC office a number of times during the summer to find out just how much I was overplanted, and to inquire about ACP and soil bank. Short was not there on any of these occasions and the office staff was unable to find my farm measurements. When later in October I went in, Mrs. Golston got my papers and I signed the Form 578 and she gave me my marketing card. There was nothing said to me about being overplanted, although the Form 578 showed 477.7 acres

planted and the marketing card showed an allotment of only 306.7 acres.

I did not see Short until about the middle of December, 1956, which I now understand was December 19. I was not called into the office by anyone on that date, but had gone there to ask about the soil bank and my 1956 ACP payment. Short was there at that time and he reminded me that I was overplanted and asked me if I had plowed up any cotton. I told him I had not destroyed any. He said that there was an investigation going on and that I had better request a measurement and pay the penalty on the excess cotton. However, I did not plow up any cotton after talking to Short on the 19th because I had already started the second picking by that time and it was then too late.

On a later date which I believe was December 28, 1956, Mathis and Ray Wolf came out where we were picking cotton and said that they were going to measure my farm. I asked them why they were going to measure and they indicated that it was being done because of my being overplanted and failure to destroy any cotton. I recall that I asked them if they had seen Short, as I wanted to know whether or not they knew about the 60 acres of extra allotment I had obtained from him. I do not believe that the matter of a lease was mentioned at that time. A few days later, I believe it was on the following Sunday, I went to Casa Grande to see Mathis and find out what the results of the measurements were. I mentioned to Mathis and Wolf, who also was there, that I had a lease for 60 additional acres of allotment. Mathis only said that they would like to see it. They said that their measurements were close to those shown on the Form 578, but they did not say what I should do about the overplanting. After that I believed it was too late to do anything, as the cotton was practically all picked and marketed.

To the best of my recollection, the next time I saw Short was at his home on the day he resigned (December 28, 1956). I had heard that he had been to Phoenix and I wanted to find out what the situation was regarding the investigation and what I should do about my overplanting and paying penalty. Short at that time said he had resigned from his ASC office position on that same day. He indicated that he did not know what was going to happen. He did not say anything about me getting a measurement nor anything about me being in any kind of trouble.

I saw Short the next and last time at Chandler. He called me on the telephone during the Christmas Holidays, and I met him at a cafe there and he said something about the investigation which was going on and that they were trying to make him (Short) the goat. I do not know what he meant by that. He asked me if I had a lawyer and he used the word "bribe" or "bribery" during the conversation. I do not recall in just what connection he used this term. I believe he implied that he was being accused of taking bribes, or that, having made payments to him, I might be accused of bribery, or that my payments to him might be construed as bribery. Short (at Chandler) did not give me any advice as to what to do and did not tell me what to say or do if the investigators called. He said that the reason he was in Chandler that evening was because he had been meeting with someone from the state office there that evening.

I had all of my 1956 short staple cotton ginned at the Chandler Gin Company and marketed it through Calcot. I gave them an authorization to place it in the loan program, but, as in 1955, I do not know whether they sold it or placed it under loan.

Regarding the overall matter of my extra allotments and failure to destroy cotton, I have been asked to comment on a number of situations or circumstances which it has been

stated should have put me on notice at the time that there was something wrong or irregular in connection with my transactions and relationship with Short, (following in hand-writing) and which indicated I knew or should have known that there was no "Burns" farm, and that Short was falsifying the records to get me extra cotton acreage, and that I knew this.

It has been stated that the fact that I have paid only \$20.00-\$25.00 per acre when allotments were bringing up to \$75.00 per acre should have indicated to me that there was something wrong. Concerning this, I have not thought about what might be called the going or market price of cotton acreage. In making arrangements with Short I just left it up to him to say how much and we never negotiated about price and it did not occur to me as reflecting anything of an irregular nature.

It has been pointed out that the fact that I planted cotton considerably in excess of my allotments, particularly in 1956, and failed to destroy the excess might indicate that I had an understanding with Short whereby he would take care of me by fixing the ASC office records, or that I had something on him and could get by without destroying my excess cotton. I now realize that it is highly irregular for a farmer to pay money to an employee of the ASC office from which the farm programs are being administered, and that such action could well be construed as an indication of unlawful conduct. In my dealings with Short from the beginning I had not thought of these implications until the meeting with him at Chandler when he mentioned bribery. I did not know that Short was not acting in good faith in these matters. I never thought of myself as being in a position at any time to bring pressure upon him to make it possible, through his connection with a Government office, for me to overplant and not have to destroy excess cotton or to take other advantages.

In my overplanting and failure to destroy the excess cotton, there were also other considerations which made me reluctant to destroy cotton. In 1956 I was over-extended on water, with the result that there were burned areas in my cotton and it looked as if my crop would not be as heavy as expected on that account, thus reducing my income. I was reluctant to destroy any of it because of this. In addition, in connection with the 1955 crop, there was talk among farmers that a lot of them were not destroying their excess cotton, and there was also talk about laxity in administering the program in the ASC office, both in 1955 and 1956. I guess I thought I might get by without plowing up my excess cotton in 1956.

ACP Practices.

I have been shown the Forms in an ACP folder in the ASC office in connection with a 1954 ditch lining practice on my Pinal County farm. According to these documents I requested assistance on a land leveling practice on May 24, 1954 and on May 27, 1954, I requested approval of change to ditch lining. In 1954 I did install about $\frac{1}{2}$ mile of 24-inch cement ditch on a line between the Northeast and Northwest quarters of my farm, but this was in the early spring, as I used this ditch to irrigate my 1954 cotton, and it would have had to be in by February or March. At that time I did not know that it was necessary to sign up for a practice before starting it, and, if as the forms indicate, my land leveling was not approved, I possibly changed to ditch lining to get a payment for the above-mentioned ditch.

I have been shown ACP forms on which certifications of need and performance appear to have been signed by Doyle H. Dunkin, USID. I did not know anyone by that name. I have never had any farming or business connections on the Indian Reservation, or with Reservation offi-

erals. I have never seen these forms before and have no explanation for the information on them. To my knowledge, there was no connection with or between my cotton acreage transactions with Short, or my failure to destroy excess cotton, and the payment to me of this ACP money. I have no explanation for what appears to be an overpayment on this practice, if, in fact, it was intended to cover the approximately $\frac{1}{2}$ mile of ditch installed in the spring of 1954.

My attention has also been called to ACP forms covering a 1954 ditch lining practice on my Maricopa County farm. I recall this practice, but I do not remember the circumstances of signing the application for payment on Form ACP-245 covering this practice, nor the similar form covering the practice in 1954 in Pinal County. With specific reference to the last paragraph above the certifications on these forms, I do not remember the circumstances under which the words "no" were inserted. I do not believe I was aware at that time of the limitation of \$1,500.00 maximum which could be paid in any one year to the same farmer for ACP assistance.

I have read the above statement consisting of 8 $\frac{1}{2}$ pages, typewritten, single-spaced, and it is the truth to the best of my knowledge and belief. I have been given an opportunity to make any changes or corrections desired by me.

(unsigned)

Rex L. Neely

Witness:

Lloyd N. Johnson, Special Agent
Compliance & Investigation Div., CSS
U. S. Department of Agriculture
San Francisco, California

Appendix 4

TABLE OF EXHIBITS

Exhibit: general description	— Exhibit No. —		Identified Page No.	Offered Page No.	Re- Pa-
	Govt.	Def.			
1954 Listing Sheets	1		33	49	
1955 Listing Sheets	2		33, 64	65	
1956 Listing Sheets	3		35, 65	66	
1954 Marketing Card Register	4		35	220	2
1955 Marketing Card Register, for Upland cotton	5		37	220	2
1955 Marketing Card Register, for extra long staple cotton	6		36	220	2
1956 Register of Marketing Cards	7		38, 70	96	
Release and Reapportionment of Cotton	8		38	141	1
Farm Folder, Farm #595	9		39, 40		
Form showing production, 3 years prior to 1954, Farm #595	9-A		136	137	1
ACP-210, ACP-212, list of business, 1954 and 1955	10		40, 76	77	
Forms to determine when farms are in compliance	{	A	46		
		B	46		
		C	46		
Copy of document on bulletin board in Casa Grande		D	177		
Farm folder for Farm 647	11		59		
Form 578 for Farm 647, 1954 short staple	11-A		61, 213	213	2
Form 578 for Farm 647, 1955 short staple	11-B		61, 144	145	1
Form 578 for Farm 647, long staple	11-C		61, 146	147	1
Form 578 for Farm 647, 1956 short staple	11-D		62, 114, 213	213	2
Notice of Allotment, Farm 647	11-E		63, 148	98	
1956 Notice of Farm Acreage Allotment, Farm 647	11-F		67	98	
Office copy, 1955 allotment notice	11-G		336	336	3
ACP Folder for Farm 647	12		60		
ACP-201, Request that the Government Share Costs of Conservation Practice	12-A		72, 73, 149, 152	154	1
ACP-247, Statement of Need, land leveling	12-B		73	154	1
ACP-245, Report of Performance	12-C		74	154	1
ACP-247, Statement of Need, concrete ditch lining	12-D		74, 150	154	1
ACP-247, Statement of Need, concrete ditch lining	12-E		75, 151	154	1
ACP-245, Report of Performance	12-F		75, 152	154	1
Supervisor's Field Sheet	12-G		239	235	
1956 Marketing Card, Upland Cotton		E	86, 219		

Appendix

27

Exhibit: general description	— Exhibit No. — Govt. Def.	Identified Page No.	Offered Page No.	Received Page No.
er, with MQ-98 and MQ-92 attached, Ellsberry to Neely	F	92	313	313
anty Deed	13-A	104	105	105
anty Deed	13-B	104	105	105
anty Deed	13-C	104	105	105
dated April 4, 1954, \$1,620.00, to Short	14-A	127, 129	132	132
dated Nov. 22, 1954, \$1,410.00, to Short	14-B	128, 129	132	132
dated Dec. 9, 1955, \$1,750.00, Neely ort	14-C	128, 129	132	132
dated March 30, 1954	15	130	131	131
ting Card, 1954, Neely	16-A	220	220	221
ting Card, 1956, Neely	16-B	220	220	221
Marketing Card, Upland Cotton	16-C	E	219, 220	220
4 Notice of Farm Acreage Allot- Marketing Quota for 1954 Crop	17-A	172, 217	218	219
d MQ-24 Notice of Farm Acreage ment, Marketing Quota for 1954	17-B	173, 217	218	219
ment Notice for the crop year 1954, 17-C	17-C	142	144	144
01, Farm 647	G	158, 309	309	309
47, concrete ditch lining	H	159	312	312
se	I	175, 313	314	314
Short statement, January 14, 1957	J	177	178	178
opa County notice to Neely of pen- or excess cotton acreage	K	179	179	284
in payment of penalty (see K)	L	179	180	180
dated March 20, 1954, \$1,620.00, to Short, and advice of stop pay-	M	180	268	269
of Allotment, extra long staple cot- 55, Neely	18-A	218	218	219
d Notice of Allotment	18-B	218	218	219
Notice of Allotment, upland cotton	19	218	218	219
National Bank Ledger Sheet, Neely	20	122	124	125
National Bank deposit slip, 00	21	123	219	219
ak film of checks and deposits, Val- tional Bank, Oct. 9, 1954	22	123		
tat of Exhibit 22	23	124	124	125
ment of Rex L. Neely, March 24, 24	24	223, 241	223, 243	244
ment of Rex L. Neely, January 22, 25	25	222	223	224

Appendix

Exhibit: general description	— Exhibit No. —		Identified Page No.	Offered Page No.	Rec Pag
	Govt.	Def.			
Outdated Performance Handbook		N	361	362	
ACP Practice Records		O	361	362	
ACP Practice Records		P	361	362	
ACP Practice Records		Q	361	362	
Supervisor's Field Sheet for 1953	26		446	450	450
Application for Payment	27		447	450	450
Application for Payment	28		448	450	450
Form 247 for 1954, concrete ditch lining	29		449	450	450
Record from ACP file	30		460	475	475
Grid Sheet	31		460	475	475
Grid Sheet	32		460	475	475
Statement of account, J. E. Patterson to Rex L. Neely		T*	480	480	480

*Defendant's exhibits numbers R and S missing; never used.

NO. 16418

IN THE
United States
Court of Appeals
For the Ninth Circuit

REX L. NEELY

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Arizona

BRIEF OF APPELLEE

JACK D. H. HAYS

United States Attorney

WILLIAM A. HOLOHAN

Assistant United States Attorney

Attorneys for Appellee



SUBJECT INDEX

	Page
Jurisdiction	1
Facts	1
Argument	4
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases Cited

	Pages
<i>Davenport v. United States</i> , 260 F. 2d 591.....	5
<i>Elwert v. United States</i> , 231 F. 2d 928.....	7
<i>Glasser v. United States</i> , 315 U.S. 60.....	5
<i>Morissette v. United States</i> , 342 U.S. 246.....	7
<i>Rickey v. United States</i> , 242 F. 2d 583.....	7
<i>Stanley v. United States</i> , 245 F. 2d 427.....	10
<i>United States v. Labovitz</i> , 251 F. 2d 393.....	6
<i>United States v. Smolin</i> , 182 F. 2d 782.....	10
<i>Wilson v. United States</i> , 162 U.S. 613.....	10
<i>Woolridge v. United States</i> , 228 F. 2d 38.....	7

Statutes Cited

Title 7, United States Code	
Section 601	2
Section 610	2
Title 18, United States Code	
Section 201	5
Title 7, Code of Federal Regulations	
Section 7.25	2
Section 7.3	2
Section 722.717(h) (2)	2
Section 722.757	2
Section 722.765	2

IN THE
United States
Court of Appeals
For the Ninth Circuit

REX L. NEELY

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Arizona

BRIEF OF APPELLEE

JURISDICTION

Appellee concurs with the authorities cited by appellant which establish jurisdiction in this Honorable Court to hear and to decide this appeal.

FACTS

During the years 1954 through 1956 the growing of cotton was subject to acreage controls by the Federal Government. The Secretary of Agriculture, pursuant to

the Agricultural Adjustment Act (7 USC 601 et seq.), was charged with the administration of the federal program. The Secretary, pursuant to the authority given to him (7 USC 610), placed the local administration of the program in the hands of the Agricultural Stabilization and Conservation County Committees, hereafter referred to as the ASC committee (7 CFR 7.3). Under the regulations of the Secretary of Agriculture, the county office manager of the ASC committees was charged with the day-to-day operation and administration of the various county offices (7 CFR 7.25, T 53-54).

The administrative procedures for handling the program as regards cotton were substantially the same for 1954 through 1956. A farmer was notified of his allotment by a Notice of Allotment (T 63); after the cotton crop was growing, the fields were measured to determine whether a farmer was planted within his allotment (T 92-93); the farmer then had the election, if he were overplanted, to destroy the excess or harvest the entire crop but pay a penalty equal to half the support price, that is a penalty of about 17½ cents per pound on short staple cotton (T 88).

Before a farmer could sell his cotton, he had to obtain from the ASC committee a marketing card. To be eligible for a marketing card, the farmer must have finally been measured as planted within his allotment or have paid the penalty on the excess (7 CFR 722.757 and 722.765).

If a farmer did not want to plant his allotment, the only way he could legally transfer it to another farmer was by means of reconstitution of the two farms into one unit — commonly called a combination by farmers. By this method the allotments were combined in one allotment representing the sum total of the former two (7 CFR 722.717 (h) (2)).

During each of the years 1954 through 1956 the appellant, a large farm operator in two Arizona counties, sought to obtain additional cotton allotment for his Pinal County, Arizona, operation. In each of the years in question, appellant paid the office manager of the Pinal County ASC office, Joe Short, a Government employee, substantial sums of money to obtain additional cotton allotment in Pinal County (Ex. 14A, 14B, 14C).

In 1954 appellant received a written lease purportedly signed by the owner (Ex. 15). This lease was delivered to appellant by Short who accepted appellant's check which was made out to him and not the purported owner of the land (T 131). Appellant also received a revised Notice of Allotment from Short showing the additional cotton allotment (T 143-144, Ex. 17C).

For the crop year 1955, appellant sought his additional allotment in late 1954 (T 336). Appellant again paid Joe Short for the additional allotment with a check payable to Short only, but the appellant received no lease and, according to his testimony, no revised Notice of Allotment showing the additional acreage (T 335, Ex. 14B). In the same crop year appellant also farmed in Maricopa County, but in this County, where he was not dealing with the office manager, he was required to form a combination, and in turn received a new Notice of Allotment for the total (T 337-338).

During the crop year 1955 appellant was measured as overplanted in Maricopa County and Pinal County. In Maricopa County appellant was refused a marketing card until he paid his penalty for the excess cotton (T 338). In Pinal County, appellant claims he did not know the actual amount of his overplant, but he did know he was overplanted (T 339). Appellant destroyed some short staple cotton and an unknown quantity of

The appellee states that a statement by the Supreme Court that the defendant's testimony must be considered, together with all the surrounding circumstances, is not dispositive of the issue. We believe his testimony must be considered if it is not contradicted in any way but, in fact, is supported by all the evidence in this case bearing on the question of intent. See *Forte v. United States* (D.C. Cir.), 94 Fed. (2d) 236.

Appellee, on page 10 of its brief, states:

"The jury was entitled to view the above matter in another light. Even as they may view false statements as consciousness of guilt, they may also consider the destruction, suppression, or fabrication of evidence as giving rise to a presumption of guilt."

We know of no evidence in the record of false statements, or the destruction, suppression, or fabrication of evidence by the appellant, and the appellee points to none in its brief.

"With intent to influence his decision" are the words of the statute (Title 18, U.S.C.A., Section 201). Appellee cites *United States v. Labovitz*, 251 Fed. (2d) 393. That case definitely holds that criminal intent is an essential element of the crime of bribery. On page 394 of *Labovitz, supra*, it is said:

"The bribery statute itself deals explicitly with the element of criminal intent, making it a crime to offer money to any person acting for the United States 'with intent to influence his decision or action on any * * * matter * * * before him in his official capacity * * * or to induce him to do or omit to do any act in violation of his lawful duty.* * *' 18 U.S.C. Sec. 201. For present purposes the important point is that the statute states the essential criminal intent in alternatives. On the face of the statute, either an intention to influence official behavior or an intention to induce unlawful action will supply the culpability which the statute requires."

The checks given Short by appellant were not given with intent to influence Short's official behavior or to induce unlawful action on the part of Short. Of course, Short knew the action was wrong *but defendant did not know it* until long after the December, 1955, check for \$1,750.00 was given Short. This does not show knowledge or corrupt intent of appellant at the time or times any of the three checks were given Short. We again stress that appellant's dealings with Short were not, insofar as appellant was concerned, in any official capacity.

We again respectfully submit that this case should be reversed and a judgment of acquittal ordered.

LOUIS B. WHITNEY
LORETTA WHITNEY
PAUL W. LAPRADE

Attorneys for Appellant



No. 16422✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

CALIFORNIA COMPRESS COMPANY, INC.,
Respondent.

Transcript of Record

Petition to Enforce An Order of the National
Labor Relations Board

FILED

JUL - 7 1959

PAUL P. O'BRIEN, CLERK



No. 16422

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CALIFORNIA COMPRESS COMPANY, INC.,
Respondent.

Transcript of Record

Petition to Enforce An Order of the National
Labor Relations Board

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint (1-F).....	7
Answer to Petition For Enforcement of an Order	41
Certificate of the National Labor Relations Board	37
Complaint and Notice of Hearing (1-C).....	3
Decision and Order.....	32
Intermediate Report and Recommended Order	11
Conclusions of Law.....	29
Findings of Fact.....	13
Recommendations	29
Names and Addresses of Attorneys.....	1
Petition For Enforcement of an Order of the National Labor Relations Board.....	39
Statement of Points Upon Which Petitioner Will Rely	44
Transcript of Proceedings and Testimony.....	45
Exhibits For General Counsel:	
1-C—Complaint and Notice of Hearing...	3

Transcript of Proceedings—(Continued):

Exhibits For General Counsel—(Continued):

1-F—Answer to Complaint.....	7
2—Petition of Employees of California Compress Co., Inc. (Partial).....	137
3—Application of Abraham Canty Dated 8/12/57 to International Longshore- men's & Warehousemen's Union.....	139
6—Application of Willie Ross Dated 10/22/57 to Union.....	139
7-C—Notice of National Labor Relations Board	141

Exhibits For Respondent:

1—Affidavit of Kenneth G. Avery.....	142
--------------------------------------	-----

Exhibit For Union:

1—Letter Dated December 30, 1957, Gerald A. Brown, Regional Director, NLRB, to Kenneth G. Avery.....	146
--	-----

Witnesses For General Counsel:

Canty, Abraham —direct (Yeates)	48
Merritts, Bonnie —direct (Yeates)	69
—redirect (Yeates)	70
—rebuttal, direct (Yeates).....	136

Transcript of Proceedings—(Continued):

Witnesses For General Counsel—(Cont.):

Reason, Deamour

—direct (Yeates)	55
—redirect (Yeates)	57

Ross, Willie D.

—direct (Yeates)	72
—cross (Avery)	74

Walls, Benny

—direct (Yeates)	58
—cross (Avery)	63

Williams, Lloyd

—direct (Yeates)	79
—cross (Leonard)	81

Witnesses for Respondent:

Avery, Kenneth G.

—direct (Doty)	103
—cross (Yeates)	104
—cross (Leonard)	106

Doty, Paul K.

—direct (Avery)	97
—cross (Yeates)	100
—cross (Leonard)	101

Handwerker, Winston

—direct (Avery)	82
—cross (Leonard)	87

Transcript of Proceedings—(Continued):
 Witnesses for Respondent—(Continued):

Hayes, Henry

—direct (Avery) 133

—cross (Leonard) 135

Kuhns, Charles H.

—direct (Avery) 123

—cross (Yeates) 128

—cross (Leonard) 129

Young, Lawrence

—direct (Avery) 113

—cross (Leonard) 121

NAMES AND ADDRESSES OF ATTORNEYS

MARCEL MALLET-PREVOST,
Assistant General Counsel,

THOMAS J. McDERMOTT,
Associate General Counsel,
National Labor Relations Board,
Washington, D. C.,

Attorneys for Petitioner.

AVERY, MEUX & GALLAGHER,
605 Security Bank Building,
Fresno, California,

DOTY & QUINLAN,
415 T. W. Patterson Building,
Fresno, California,

Attorneys for Respondent.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
Before The National Labor Relations Board

Case No. 20-CA-1366

CALIFORNIA COMPRESS COMPANY, INC.,

and

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION

COMPLAINT AND NOTICE OF HEARING

It having been charged by the International Longshoremen's and Warehousemen's Union (herein called the Union) that California Compress Company, Inc. (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136 (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 6, as amended:

I.

On December 9, 1957, the above-mentioned charge was duly served on the Respondent.

General Counsel's Exhibit No. 1-C—(Continued)

II.

Respondent is and has been since 1953 a California corporation with its principal office located at Nielsen Avenue and Marks Street, Fresno, California, where it is engaged in the storage, handling, and processing of cotton.

III.

During the calendar year ending December 31, 1956, Respondent stored, processed, and handled in excess of \$20,000,000 worth of cotton for its customers, of which approximately \$15,000,000 was shipped by such customers to points outside the State of California. Respondent, during the same calendar year, received fees in excess of \$250,000 for its services from companies having their principal place of business outside the State of California.

IV.

The Respondent is engaged in and at all times material herein was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

V.

International Longshoremen's and Warehousemen's Union is a labor organization within the meaning of Section 2(5) of the Act.

VI.

Lawrence A. Young, C. H. Kuhns, Henry Hayes, Donald Robinson and Charles Coons were at all times material herein supervisors of the Respondent within the meaning of Section 2(11) of the Act.

General Counsel's Exhibit No. 1-C—(Continued)

VII.

Respondent, acting by and through its officers, agents, and representatives whose names are set forth below, and on or about the dates appearing hereafter, engaged in the following acts and conduct:

A. On or about November 20, 1957, plant superintendent, Lawrence A. Young, interrogated and questioned employees as to their union activities and sympathies and warned and threatened them with loss of overtime, loss of earnings, and discharge, if they favored, joined, or assisted the Union.

B. On or about December 6, 1957, supervisors Lawrence A. Young, C. H. Kuhns, Henry Hayes, Donald Robinson and Charles Coons did circulate or had circulated an affidavit concerning the union activities and sympathies of the employees among said employees and interrogated and questioned them concerning their union activities and sympathies, and by coercion and threats induced certain of said employees to affix their signatures to the aforesaid affidavit.

C. On or about December 7, 1957, Superintendent Lawrence A. Young warned and threatened certain employees that if they had not signed the aforesaid affidavit concerning the union activities and sympathies of the employees they would have been discharged.

VIII.

By the acts set forth in paragraph VII, above,

General Counsel's Exhibit No. 1-C—(Continued) subdivisions A through C, both inclusive, and each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IX.

The acts of the Respondent set forth in paragraph VII, above, subdivisions A through C, both inclusive, and each of said acts, have a close, intimate and substantial relation to trade, traffic and commerce among the several States of the United States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

X.

The aforesaid acts of Respondent as set forth in paragraph VII, above, subdivisions A through C, both inclusive, and each of said acts, constitute unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Please Take Notice that on the 11th day of March, 1958, at ten o'clock in the forenoon, in Room 210 of the City Hall, Fresno, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to

General Counsel's Exhibit No. 1-C—(Continued) appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of a verified answer to said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, on this 14th day of February, 1958, issues this Complaint and Notice of Hearing against California Compress Company, Inc., Respondent named herein.

/s/ GERALD A. BROWN,
Regional Director, National Labor Relations Board,
Twentieth Region.

GENERAL COUNSEL'S EXHIBIT No. 1-F

[Title of Board and Cause.]

ANSWERS TO COMPLAINT

Comes Now the respondent California Compress Co., Inc., and answering the complaint heretofore filed herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, III, IV and V.

General Counsel's Exhibit No. 1-F—(Continued)
II.

Answering the allegations contained in paragraph VI thereof, admits that Lawrence A. Young, C. H. Kuhns, Henry Hayes and Donald Robinson were at all times referred to in said complaint supervisors of the respondent; further answering the allegations contained in paragraph VI thereof, denies generally and specifically each and every, all and singular of said allegations except as hereinabove expressly admitted.

III.

Answering the allegations contained in paragraph VII, denies generally and specifically each and every, all and singular of said allegations, and in this connection specifically answers as follows:

A. Denies that on or about November 20th, 1957, or on any other date or at all, Lawrence A. Young, or any other officer, agent or representative of respondent, interrogated or questioned employees as to their union activities or sympathies, or warned or threatened them with loss of overtime, loss of earnings, or discharge, if they favored, joined or assisted the union; and in this connection specifically denies that said Lawrence A. Young, or any other officer, agent or representative of respondent, did at any time, or at all, interrogate or question employees as to their union activities or sympathies, or did at any time, or at all, warn or threaten any employee with regard to any matter or thing whatsoever.

B. Denies that on or about December 6, 1957, or

General Counsel's Exhibit No. 1-F—(Continued)
on any other date, or at all, supervisors Lawrence A. Young, C. H. Kuhns, Henry Hayes or Donald Robinson, or any other officer, agent or representative of respondent, did circulate or had circulated an affidavit, or any other document whatsoever, concerning the union activities or sympathies of the employees among said employees, or any of them, or interrogated or questioned said employees, or any of them, concerning their union activities or sympathies or by coercion or threats, or by any other unlawful or improper means, induced certain, or any, of said employees to affix their signatures to any affidavit or any other document whatsoever.

C. Denies that on or about December 7, 1957, or on or about any other date, Superintendent Lawrence A. Young warned or threatened certain, or any, employees that, if they had not signed any affidavit or any other document whatsoever concerning the union activities or sympathies of the employees, or concerning any other matter or thing whatsoever, they would have been discharged.

IV.

Answering the allegations contained in paragraph VIII, this answering respondent denies each and every, all and singular, the allegations therein contained; specifically denying that this answering respondent committed the acts set forth in paragraph VII of said Complaint or subdivisions A to C, inclusive, of said paragraph VII, or that this answering respondent interfered with, or coerced, or has

General Counsel's Exhibit No. 1-F—(Continued)
interfered with, or restrained, or coerced, its employees in the exercise of the rights granted them in Section 7 of the Act, or any other Section of the Act, or that they have restrained, coerced or interfered with said employees in any manner whatsoever; further specifically denying that this answering respondent, its agents, servants and employees, did thereby, or by any other act or conduct, engage in, or is presently engaging in, unfair labor practices under Section 8(a)(1) of the Act, or at all.

V.

Answering the allegations contained in paragraph IX, this answering respondent denies each and every, all and singular, the allegations therein contained; specifically denying that it committed any of the acts set forth in paragraph VII of Subdivisions A through C, inclusive, of said paragraph VII, or that any act or conduct on the part of this answering respondent, its agents and servants, had, or did have, a close, or intimate, or substantial, or any other effect in relationship to trade, or traffic, or commerce among the several states of the United States, or tended to lead to labor disputes, or in any other manner interfered with labor relations; further specifically denying that said alleged conduct burdened, or obstructed, commerce or the free flow of commerce, or in any other manner affected commerce.

VI.

Answering the allegations contained in paragraph

General Counsel's Exhibit No. 1-F—(Continued)
X, this answering respondent denies each and every, all and singular, the allegations therein contained; specifically denying that this answering respondent committed the acts alleged in said paragraph VII of said complaint or the acts alleged in paragraph VII, subdivisions A through C, inclusive, of said paragraph VII, or that said alleged acts, or any other acts, or conduct, constitute unfair labor practices within the meaning of Section 8(a)(1) or (3) or Section 2(6) or (7) of the Act, or any other division or subdivision of the Act, or that this answering respondent, its agents and servants, or employees or officers, are in violation of any provision of said Act.

Wherefore, this answering respondent prays that said Complaint be dismissed.

AVERY, MEUX & GALLAGHER,
DOTY, EVANS & QUINLAN,

/s/ By KENNETH G. AVERY,
Attorneys for Respondent.

Duly Verified.

Affidavit of Service by Mail Attached.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Statement of the Case

Upon a charge duly filed on December 9, 1957,
by International Longshoremen's and Warehouse-

men's Union, herein called the Union, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel¹ and the Board, by the Regional Director for the Twentieth Region (San Francisco, California), issued his complaint, dated February 14, 1958, against California Compress Company, Inc., herein called Respondent, alleging that Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

Copies of the charge and complaint, together with notice of hearing thereon, were duly served upon Respondent and upon the Union.

Specifically, the complaint alleged that Respondent (1) on or about November 20, 1957, interrogated and questioned its employees regarding their Union activities and sympathies and warned and threatened them with loss of overtime, loss of earnings, and with discharge, if they joined, favored, or assisted the Union; (2) on or about December 6, 1957, circulated a document among its employees concerning their Union activities and sympathies and by coercion and threats induced certain of the employees to sign said document; and (3) on or about December 7, 1957, warned and threatened certain employees that if they had not signed the aforesaid affidavit they would have been discharged.

¹ This term specifically includes counsel for the General Counsel appearing at the hearing.

Respondent duly filed an answer denying the commission of the unfair labor practices alleged.

Pursuant to due notice, a hearing was held on March 18 and 19, 1958, at Fresno, California, before the undersigned, the duly designated Trial Examiner. All parties were represented by counsel and participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence relevant to the issues, to argue orally at the conclusion of the taking of the evidence, and to file briefs on or before April 10, 1958.² Briefs have been received from Respondent's counsel and from counsel for the charging party which have been carefully considered. Respondent's motion, made at the conclusion of the hearing and on which decision was reserved, to dismiss the complaint for lack of proof is disposed of in accordance with findings, conclusions, and recommendations set forth below.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. Respondent's business operations

California Compress Company, Inc., a California corporation, has its principal offices and place of business at Fresno, California, where it is engaged in the storage, handling, and processing of cotton. During 1956, Respondent stored, processed, and handled in excess of \$20,000,000 worth of cotton for

² At the request of Respondent's counsel the time to file briefs was extended to April 21, 1958.

its customers, of which approximately \$15,000,000 worth was shipped by such customers to points located outside the State of California. During the same year, Respondent received fees in excess of \$250,000 for services rendered to concerns having their principal places of business outside the State of California.

Upon the above undisputed facts, the undersigned finds that during all times material Respondent was, and now is, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act and that it will effectuate the purposes of the Act for the Board to assert jurisdiction in this proceeding.

II. The labor organization involved

International Longshoremen's and Warehousemen's Union is a labor organization admitting to membership employees of Respondent.

III. The unfair labor practices

A. The pertinent facts

On November 6, 1957,³ the Union filed a petition with the Board in which it requested that it be certified as the bargaining representative for a unit composed of all Respondent's nonsupervisory production and maintenance employees. A copy of said petition was received by Respondent on November 7 or 8.

By mere coincidence, Jaul K. Doty, Esq., one of Respondent's counsel, happened to be in the Re-

³ Unless otherwise noted, all dates hereinafter mentioned refer to 1957.

gional Offices the day the aforementioned petition was filed. Upon being informed by one of the Board's Field Examiners of the filing of the petition, Doty inquired whether the Union had "made a sufficient showing of interest." The Field Examiner replied in the affirmative. Later that day, Doty telephoned from his San Francisco hotel to Winston Handwerker, Respondent's general manager who was in Fresno, and advised Handwerker of the filing of the petition and of the Union's apparent showing of sufficient interest to warrant processing the petition. Handwerker replied, to quote from Doty's credible testimony, "I don't believe there could be any union members or any applications signed, let alone a majority of our employees."⁴ Doty then said, "I had not discussed with the Board officials the authenticity of the cards or how current they were or anything along that line, but I would check with them."

The next work day, Doty went to the Board's offices and was informed by another Field Examiner that the authorization cards submitted by the Union "seemed to be current and that approximately 80

⁴ Handwerker testified that he based his doubts that the employees desired to be unionized upon the fact that in a Board-conducted election held in December 1956, the employees voted against being represented by International Chemical Workers Union, Local No. 97, and, for the further reason, "All of the information that I had available pointed to the fact that the employees were perfectly satisfied with their present setup, and that we had statements volunteered to us stating that the employees did not want a union."

percent of the 86 employees" of Respondent had signed such cards. According to Doty's credible testimony the following then ensued between him and the Field Examiner:

I asked him what the procedure was if these cards turned out to be not authentic. He said usually they would have the FBI check the signatures and compare those with signatures on cancelled pay checks. I asked [him] not to proceed further until I talked with the company, but perhaps that should be done * * *.

On or about the same day that Handwerker received the representation petition he informed Plant Superintendent Lawrence Young of its receipt and then asked Young "if any of our employees had signed cards or had asked for representation," to which inquiry Young replied that he was sure that none of the employees had. Handwerker then asked Young if he knew of any way he could ascertain whether the employees had signed Union cards, and Young replied, "All I [have] to do [is] ask the boys." Later in the day, Young, after talking to three or four of the employees, reported to Handwerker that he had been told "by some of the boys" that "no one had signed [union cards] or was interested in the Union."

Three or four days after Young had asked "some of the boys" about their Union affiliations, he entered the boiler or smoke room where some 40 or 50 employees had gathered during the afternoon rest period, and stated that he had information that about 50 employees had signed Union cards; that

he was going to ascertain who they were; that the men must be unhappy if they had signed Union cards; that if the employees were unhappy they should come to him with their "beefs" and he would attempt to correct the situation without any expense to the aggrieved employees; and that it was unnecessary for the employees to pay anyone to be their representative. Young also informed the employees on this occasion that if any of them were unhappy with their working conditions they should advise him and Respondent would gladly assist them in getting located elsewhere.

The same day Young addressed the men in the boiler room, he called into his private office Charles Kuhns, Henry Hayes, and Don Robinson, Respondent's three foremen, and, after stating that he had heard there were rumors going around the plant to the effect that the men had signed Union cards, requested the foremen to ascertain whether the men in fact had signed such cards or were in any way interested in unionization.

Hayes testified, and the undersigned finds, that pursuant to Young's request he asked the men in his crew whether they were "happy" and that each of them replied in the affirmative.⁵

Robinson testified, and the undersigned finds, that pursuant to Young's request he asked the men in his crew whether they were happy with their work and that later that day or the next day he informed

⁵ For reasons not disclosed by the record, this information was not relayed to Young.

Young that the men in his crew "seemed to be very happy."

Kuhns testified, and the undersigned finds, that directly after Young's aforementioned boiler room talk he called his crew into his office and stated

* * * I had been told that we received word that a good majority of the men had signed union cards to be represented by a union and that it was my belief, as well as Mr. Young's belief, that our men were satisfied with their work and they had not signed the cards. And if there was any [employee] that [was] not satisfied, we would like to know ourselves in order to correct what we were doing wrong, or help them out in any way we could.

Kuhns further testified, and the undersigned finds, that some of the men then stated that they had not signed union cards; and that later in the day he told Young, "All of my men seemed to be contented, and they didn't want a union."

Under date of November 21, the Acting Regional Director of the Twentieth Region, for and on behalf of the Board, served a notice upon the parties to the effect that a hearing would be held before a Hearing Examiner on December 10, to resolve the question raised by the Union's November 6 petition for representation of Respondent's nonsupervisory production and maintenance employees. A copy of said notice was received by Respondent on or about November 22.

Employee Benny Walls testified, and the undersigned finds, that in November, Young told a group of yard employees that if the Union successfully

organized the employees, "the block men will come out in the yard and take the jobs" of the yard men.

On December 4, Handwerker requested Young to ascertain from the foremen whether they saw any objection to the circulation among the employees of a document, herein called an affidavit, bearing the following legend:

The undersigned, each for himself, after first being sworn, deposes and says:

That he was on the 6th day of November, 1957, and is now, employed by California Compress Co., Inc., a corporation, at its cotton compressing plant at Nielsen Avenue and Marks Street, Fresno, California, and in such employment performs production and maintenance work; that he has not affixed his signature to any card or paper intending thereby, or being advised that such signature would be used, to support a claim of representation by International Longshoremen's & Warehousemen's Union, Independent, and that he has not knowingly signed any such document.⁶

The same day, December 4, Young called Kuhns, Robinson, and Hayes into his office and instructed Kuhns to circulate the affidavit among his crew and then to circulate it, in Robinson's presence,

⁶ Handwerker testified, "The information I was seeking [by the circulation of the affidavit] was for my own information. I wanted to know whether or not the men in our plant actually had signed cards, applications cards, for a union, and if they had signed them not knowing what they had signed, I wanted to know; and if they had not signed them, I wanted to know."

among the men under Robinson's supervision, and then in Hayes' presence, circulate it among the men in Hayes' crew. Young further instructed Kuhns to obtain the signatures to said affidavit of the men who had not signed Union cards and of those who actually had signed such cards but who stated that they did not know what they were signing at the time of the execution of the cards.

Kuhns thereupon went to his men and, after reading the affidavit to them, obtained the signatures of all of them except two who refused to sign because they had signed Union cards. He and Hayes then obtained the signatures of all of Hayes' crew, except one who signed with an "X". Kuhns, in Robinson's presence, then proceeded to obtain the signatures of the latter's crew. Because of the lateness of the hour, Kuhns and Robinson were unable to approach all of Robinson's men and thus were compelled to wait until the following morning to complete their task.

By about 10 o'clock on December 5, Kuhns had obtained the signatures of 82 employees of the 86 nonsupervisory personnel in Respondent's employ on November 6, the date of the filing of the representation petition.⁷

Employee Merritts, a member of Kuhns' crew, testified that when Kuhns approached him with the aforementioned document on December 4, Kuhns stated, to quote from Merritts' credible testimony,

⁷ Under date of December 10, Kuhns swore to the affidavit as a subscribing witness.

“All I want to know is if you did sign for the union, don’t sign this list; if you didn’t sign for the union, sign this list”; that when he advised Kuhns that he had “signed for the union,” the latter remarked, “Well, that don’t involve you then”; and that later in the day the following transpired, to again quote Merritts’ credible testimony,

I met him (Kuhns) at his office * * * and he said to me, “If I were you, at your age,^s I would take my name off and tell them (the Union) I didn’t know what I was signing.” I said, “Well, I knew what I was signing.” And he said, “Well, if I were you, at your age, I would take my name off and tell them I didn’t know what I was signing.” And I told him I knew what I was signing, and I said, “It don’t make no difference to me.”

According to the credited testimony of Employee Canty, the following transpired when Kuhns and Robinson discussed with him the aforementioned affidavit:

Q. And will you state the circumstances of your seeing it and what, if any, statements were made to you regarding the document, General Counsel’s No. 2, by Mr. Kuhns?

A. Well, I went in the office. He called me in the office, and he had it in there.

Trial Examiner: Who is “he”?

The Witness: Charlie Kuhns. And he told me had a petition that he wanted to sign, and I asked him for what, and he said the fellows didn’t want

^s Merritts was 64 years of age at the time of the hearing.

no union, and I told him I didn't want to sign it. And then Robinson said——

Q. (By Mr. Yeates): Is this Mr. Robinson your supervisor? A. Yes.

Q. All right. Go ahead.

A. He said, "If you haven't signed one of these union cards, sign then. But if you have signed one of these union cards, don't sign it." He said, "If you signed a union card and didn't know what you was signing, sign that." So I told him I didn't want to be involved either way.

So he said——

Trial Examiner: Who said this?

The Witness: Then Kuhns said, "Well, the majority signed it already." So he pointed out several names to me. I saw the name of Shirley Richardson, Bonnie Merritts. Those was the only two men that signed it that knew what they was signing.

Trial Examiner: Signed what?

The Witness: The union card. I said, "Well, if I didn't sign the union card, why should I sign that? I don't want to be in bad with the company and be in bad with the union. If the union has an election they can get back at me."

Then he said, "Well, there won't be no election." He said——

Trial Examiner: Who?

The Witness: Charlie Kuhns. He said, "Well, the best thing for you to do is sign this because there's not going to be no election. You have been with us a long time and we would hate to see you go." So I signed it.

Employee Reason testified, and the undersigned finds, that during a discussion he had with Young regarding the affidavit submitted to him by Kuhns and Robinson which, by the way, he signed reluctantly because he had previously signed a Union card, Young remarked that if he knew who had signed Union cards he would discharge every one of them.

According to the credited testimony of Employee Ross, he signed the affidavit only after Hayes had told him that he had not realized what he was doing when he signed a Union card.

Employee Williams testified, and the undersigned finds, that he signed the affidavit after Hayes had stated to him that Young wanted the employees to sign it.

Kenneth G. Avery, Esq., Respondent's general counsel, testified credibly that at a meeting held in Doty's offices on December 13, with the Field Examiner Doty first consulted about the Union's representation petition, he delivered to her the affidavit which the employees had signed on December 4 and 5, remarking,

* * * we had circulated this document for the purpose of producing evidence that the Board would consider as to the sufficiency of representation; that I wished to file the original of this document in the representation proceedings, and asked her if she was willing to accept the photostatic copy for her purposes in connection with the unfair labor charge hearing.

Avery further credibly testified that the Field Examiner accepted the document and commented, "Probably the best procedure was to submit payroll checks which the Board could then check against the union authorization cards to determine the authenticity of the signatures" appearing thereon; and that on December 17, he submitted payroll checks bearing the endorsements of the 86 employees on Respondent's payroll of November 8.

Under date of December 30, the Regional Director of the Twentieth Region wrote Avery as follows:

We have considered the allegations which you have made and the evidence which you have submitted relating to the validity of the showing made by the petitioner in the above-entitled case. From a consideration of such evidence, as well as from our own independent investigation, we are satisfied that there is no reasonable basis to find that the showing is not valid and, therefore, we conclude that the Union has made a valid showing sufficient to support its petition.

Although the charge against your client, filed in Case No. 20-CA-1366, is a separate proceeding, it is not wholly unrelated in some of its aspects. Our investigation of the charge case is not yet complete, but I feel that I should advise you that information presently at hand indicates the possibility that your instructions regarding the circulation of the petition in the instant case were not closely followed. We have some evidence which would indicate that supervisory personnel made coercive and unlawful state-

ments to employees during the course of circulating the petitions.

The charge has been assigned to Mr. Robert Yeates, attorney in this office, and he will communicate with you directly regarding it in the near future.

B. Concluding findings

The right of employees under Section 7 of the Act "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing * * * [and] to refrain from any or all of such activities" is effectively implemented by Section 8 (a) (1). This latter provision forbids an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The employer's economic hold over his employees, which inheres in their relationship, is thereby neutralized by the provisions of said sections in matters of organization and representation, which are peculiarly the concern of the employees. Interdiction against employer intrusion in such matters is essential if employees are to be free from the coercive influence of their employer, for employees are, as the courts have repeatedly and uniformly found, not insensitive to the advantages in their employment that they consider are likely to flow from their employer, nor the disadvantages which may attend their choice of representatives opposed by their employer. And for the same reason, employees cannot be expected to derive the full benefit from their protected right of self-organization and the selection of a repre-

sentative of their own choosing if they believe, from circumstances which their employer created or for which he was fairly responsible, that their representative, however chosen, is subject to the employer's approval or disapproval.

In open disregard of its duty of neutrality, Respondent, upon being advised by the Board that the Union had filed a petition seeking certification as the bargaining representative of its nonsupervisory production and maintenance employees and that approximately 80 percent of the employees had signed cards authorizing the Union to bargain collectively for them, embarked upon a campaign to wean the employees away from their chosen representative. The testimony upon which this finding is based rests mainly, but not solely, upon that of Respondent's managerial personnel and its other responsible representatives. Thus, it is admitted that the foreman, upon instructions from Young, queried the employees about their activities and sympathies for the Union. By such questioning, in the setting, the conditions, the methods, the incidents, as disclosed by the credited evidence, Respondent invaded an area guaranteed to be exclusively the concern of the employees, for inherent in the very nature of an employee's statutory right to organize is the accompanying right to privacy in its enjoyment, free from employer intermeddling or intrusion.⁹

⁹ N.L.R.B. v. Syracuse Color Press, Inc., 209 F. 2d 596 (C.A. 2); H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514; N.L.R.B. v. Deena Products Company,

Respondent well knew, at the time it circulated the affidavit on December 4 and 5, that there existed a real question concerning the representation of certain of its employees for it had been advised by the Board of the filing of the representation petition and of the Union's showing of substantial interest. The Congress has clothed the Board with the exclusive power to investigate and determine representatives for the purposes of collective bargaining. In the exercise of this power, the Board usually makes such determination, after a proper hearing and at a proper time, by permitting employees freely to select their bargaining representative by secret ballot. In this case, however, Respondent elected to disregard the orderly procedure set up by the Board under the Act and arrogated to itself the resolution of the representation question.

Relying heavily on *Globe Iron Foundry*, 112 NLRB 1200, Respondent seeks to defend its circulation of the affidavit as a proper procedure to bring to the Board's attention its claim that the cards submitted by the Union to the Board were not signed by its employees or, in the alternative, if its employees, in fact, had signed the cards the

195 F. 2d 330 (C.A. 7); *N.L.R.B. v. Laister-Kaufman Aircraft Corp.*, 144 F. 2d 9 (C.A. 8); *N.L.R.B. v. Chautauqua Hardware Corp.*, 192 F. 2d 492 (C.A. 2); *N.L.R.B. v. Brezner Tanning Co.*, 141 F. 2d 62 (C.A. 1); *N.L.R.B. v. National Plastic Products Co.*, 175 F. 2d 755 (C.A. 4); *N.L.R.B. v. Valley Mould & Iron Corp.*, 116 F. 2d 760 (C.A. 7); *N.L.R.B. v. LaSalle Steel Co.*, 178 F. 2d 829 (C.A. 7).

employees were not aware of their purport. That case is distinguishable from the present one. Here, Respondent first interrogated its employees as to Union matters, then polled the employees as to their union affiliations and sympathies. Even though Respondent's purpose in the interrogation and the subsequent polling of the employees may have been intended, as Respondent contends, merely to bring to the Board's attention Respondent's doubts that its employees desired to be represented by the Union the interrogation and the subsequent polling, under all the circumstances here present, extended beyond the permissible limits of employer interrogation.¹⁰

Upon the entire record in the case, the undersigned is convinced, and finds, that by the interrogation of its employees, including the polling, Respondent violated Section 8 (a) (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent, set forth in Section III above, occurring in connection with its operations, described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

¹⁰ Polling of employees regarding their union affiliations or sympathies, is akin to interrogation.

V. The remedy

Having found that Respondent has engaged in unfair labor practices, violative of Section 8 (a) (1) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the record as a whole, the undersigned makes the following:

Conclusions of Law

1. California Compress Company, Inc., Fresno, California, is engaged, and during all times material was engaged, in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. International Longshoremen's and Warehousemen's Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By polling or interrogating its employees as to whether they desired to be represented by the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the record as a whole, the undersigned recommends that California Compress Company, Inc., Fresno, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Polling or interrogating its employees as to whether they desire to be represented by International Longshoremen's and Warehousemen's Union, or interrogating its employees in any other manner concerning their membership in, or other activities on behalf of that or any other labor organization, in any manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Post at its plant in Fresno, California, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative, be posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Twentieth Region, in writing, within twenty (20) days from the receipt of this Intermediate Report and

Recommended Order what steps Respondent has taken to comply therewith.

It is further recommended that unless within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order the Respondent notifies said Regional Director that it will comply with the foregoing recommendations, the Board issue an order requiring Respondent to take the aforesaid action.

Dated this . . . day of May 1958.

/s/ HOWARD MYERS,
Trial Examiner.

APPENDIX "A"

Notice to All Employees: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not poll or interrogate our employees as to whether they desire to be represented by International Longshoremen's and Warehousemen's Union, nor will we interrogate our employees in any manner concerning their membership in, or other activities on behalf of that or any other labor organization, in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act.

We Will Not in any like or related manner inter-

fere with, restraint or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

California Compress Company, Inc.
(Employer)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board

Case No. 20-CA-1366

CALIFORNIA COMPRESS COMPANY, INC.
and INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S UNION

DECISION AND ORDER

On May 5, 1958, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

We agree with the Trial Examiner that the Respondent violated Section 8 (a) (1) of the Act.

In so concluding we note that the Employer's interrogation and polling of employees was accompanied in a number of instances, by threats of loss of employment if the Union were successful in its organizational campaign. Accordingly, we find that the purpose of the interrogation and polling in such context was to undermine the Union, and not, as Respondent contends, to gather evidence to assist the Board in determining the authenticity of the showing of interest made by the Union in its representation case. Under all the circumstances, the Employer's interrogation and polling constitute interference, restrain, and coercion within the meaning of Section 8 (a) (1) of the Act.¹

¹ Blue Flash Express, Inc., 109 NLRB 591, 593; Mid-South Manufacturing Co., Inc., 120 NLRB No. 39. In the absence of exceptions to the failure of

Order

Upon the entire record herein, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, California Compress Company, Inc., Fresno, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating or polling its employees regarding their union activities, affiliations, or sympathies in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act;

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its plant in Fresno, California, copies of the notice attached hereto marked "Appendix".²

the Trial Examiner to find the threats of loss of employment to be a violation of the Act, we will make no such finding herein.

² In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, as to the steps the Respondent has taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found to have been committed herein.

Dated: Washington, D. C., October 16, 1958.

BOYD LEEDOM, Chairman,
PHILIP RAY RODGERS, Member,
JOSEPH ALTON JENKINS,
Member,

[Seal] National Labor Relations Board.

APPENDIX

Notice to All Employees: Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not interrogate or poll our employees regarding their union activities, affiliations, or sympathies in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

California Compress Company, Inc.
(Employer)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CALIFORNIA COMPRESS COMPANY, INC.,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.92, Rules and Regulations of the National Labor Relations Board—Series 7, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its record as Case No. 20-CA-1366. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Howard Myers on March 18 and 19, 1958, together with all exhibits introduced in evidence, also rejected exhibit.

2. Copy of Trial Examiner Howard Myers' In-

intermediate Report and Recommended Order dated May 5, 1958 (annexed to item 4 hereof).

3. Respondent's exceptions to the Intermediate Report received June 13, 1958.

4. Copy of Decision and Order issued by the National Labor Relations Board on October 16, 1958, with Intermediate Report attached thereto.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 12th day of May, 1959.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 16422. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. California Compress Company, Inc., Respondent. Transcript of the Record. Petition to Enforce an Order of the National Labor Relations Board.

Filed: May 18, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16422

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CALIFORNIA COMPRESS COMPANY, INC.,
Respondent.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 72 Stat. 945), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, California Compress Company, Inc., Fresno, California, its officers, agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as Case No. 20-CA-1366.

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California within

this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board in October 16, 1958, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon the Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board

and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 2nd day of April, 1959.

/s/ THOMAS J. McDERMOTT,

Associate General Counsel, National
Labor Relations Board.

[Endorsed]: Filed April 6, 1959. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF THE NA-
TIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Now comes the respondent in the above entitled
action.

The respondent, pursuant to the National Labor Relations Act, files this answer to petition for enforcement of the National Labor Relations Board order issued by the Board against respondent and requests that said order be set aside or modified and that the request for enforcement be denied.

I.

The respondent admits the allegations in paragraph 1 of petitioner's application for enforcement.

II.

Answering the allegations contained in paragraph 2 the respondent admits that the National Labor Relations Board (herein referred to as Board) made its findings of fact, conclusions of law, and order on October 16, 1958, directed to the respondent, its officers, agents, successors and assigns, and the service thereof, and, except as herein admitted, denies each and every, all and singular, the remaining allegations therein contained.

III.

The respondent, California Compress Company, Inc., in further answer to the petition filed herein by the Board for enforcement of its order entered in said proceeding of the Board known as 20-CA-1366 respectfully represents:

(a) That said order was entered by the Board on hearsay and inference, and respondent further respectfully submits that the order issued herein is not based upon the preponderance of proper and legal evidence and that the findings of fact and conclusions of law are contrary to the credible evidence when the entire record is considered. In this connection the respondent alleges that there is no substantial evidence in the record to sustain the findings that the respondent, its agents, servants or employees, violated Section 8(a)(1), or any other provision, of the National Labor Relations Act.

(b) That said Board's order is arbitrary and capricious, constitutes an abuse of discretion, and exceeds the powers vested in the Board.

(c) That said Board, despite respondent's exceptions to the intermediate report and recommended order, has failed and refused to find that respondent has not engaged in acts constituting unfair labor practices within the meaning of the National Labor Relations Act.

(d) That said order, unless vacated, will impose restraints upon respondent which are violative of the right of free speech guaranteed by the First Amendment of the United States Constitution and Section 8(c) of the Labor-Management Relations Act.

(e) That the respondent was denied due process of law by the Board and at the hearing of the charges brought by the Board, in that:

(1) The complaint and notice of hearing issued by the Board and served upon the respondent failed to set out concisely and failed to designate with particularity the acts or omissions alleged as unlawful and did fail to set forth the charges in such manner that persons of reasonable intelligence could ascertain the acts or omissions charged;

(2) The evidence adduced at the hearing which forms the basis of the decision of the Board was not responsive to the complaint and notice of hearing or the issues framed by the pleadings, which said evidence was received over objection and retained in the record over motion to strike; and that respondent by the complaint and notice of hearing had no knowledge of the acts or omissions charged and was not afforded by the complaint an

opportunity to defend itself against said acts or omissions which formed the basis of the award.

Wherefore, respondent prays that the Court make and enter its decree dismissing said proceedings.

AVERY, MEUX & GALLAGHER,
TOTY & QUINLAN,

/s/ By PAUL K. DOTY,
Attorneys for Respondent.

[Endorsed]: Filed April 25, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

In this proceeding, petitioner National Labor Relations Board will rely upon the following point:

Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act.

Dated at Washington, D. C., this 12th day of May, 1959.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

[Endorsed]: Filed May 15, 1959. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-1366

In the Matter of: California Compress Company,
Inc., and International Longshoremen's and
Warehousemen's Union.

TRANSCRIPT OF PROCEEDINGS

Room 210, City Hall, 2326 Fresno Street, Fresno,
California, Tuesday, March 18, 1958.

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 o'clock a.m.

Before: Howard Myers, Trial Examiner.

Appearances: Robert M. Yeates, 830 Market
Street, San Francisco, California, appearing on
behalf of the General Counsel, National Labor Re-
lations Board. Avery, Meux and Gallagher, by
Kenneth G. Avery, 605 Security Bank Building,
Fresno, California, appearing on behalf of Re-
spondent California Compress Co., Inc. Doty, Evans
& Quinlan, by Paul K. Doty, Suite 415 T. W. Pat-
terson Building, Fresno, California, appearing on
behalf of Respondent California Compress Co., Inc.
Gladstein, Anderson, Leonard & Sibbett, by Nor-
man Leonard, 240 Montgomery Street, San Fran-
cisco, California, appearing on behalf of the Charg-
ing Party, International Longshoremen's and Ware-
housemen's Union. [2]*

* * * * *

* Page numbers appearing at top of page of Reporter's Trans-
cript of Record.

Trial Examiner: Mr. Yeates, have you any motions addressed to the pleadings?

Mr. Yeates: Yes, I have. I would like to make a motion to amend paragraph 6 of the pleading to delete the name Charles Coons, spelled C-o-o-n-s, [8] inasmuch as the Charles Coons referred to is the same party referred to beforehand in the same paragraph as C. H. Kuhns. They are one and the same person.

Trial Examiner: Any objections, Gentlemen?

Mr. Doty: No objection.

Mr. Avery: No objection.

Trial Examiner: There being no objection, the motion is granted.

Have you any other motions?

Mr. Yeates: Yes. Also under section 102.20 I would like, under the Board's rules, that the following paragraphs of the complaint be admitted and deemed as true by the Trial Examiner for the reason that the answer has failed to deny the application. The paragraphs referred to are 1, 2, 3, 4, 5 and 6 as amended.

Trial Examiner: Any objection?

Mr. Doty: No objection.

Mr. Avery: No objection.

Trial Examiner: The motion is granted without an objection.

Any other objections, Mr. Yeates? [9]

Mr. Yeates: No, sir. [10]

* * * * *

Mr. Avery: Mr. Trial Examiner, may I also call your attention to paragraph "b" of paragraph

7—subsection “b” of paragraph 7 in which the name Charles Coons also appears. I don’t know whether General Counsel had meant to amend by striking the name from that paragraph also.

Trial Examiner: Well, is Coons, C-o-o-n-s, and [11] Charles Kuhns, K-u-h-n-s, one and the same person?

Mr. Avery: There is no Charles C-o-o-n-s.

Mr. Yeates: Yes. The name Charles Coons, C-o-o-n-s, in that paragraph should be stricken to conform with paragraph 6.

Trial Examiner: Any objection?

Mr. Doty: No objection.

Mr. Avery: No objection.

Trial Examiner: There being no objection, the motion is granted.

Are there any other motions, gentlemen, at this time?

(No response.)

* * * * *

ABRAHAM CANTY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Abraham Canty.

Trial Examiner: How do you spell your last name?

The Witness: C-a-n-t-y.

Trial Examiner: And where do you live? [12]

(Testimony of Abraham Canty.)

The Witness: 226 West Chandler.

Trial Examiner: Fresno?

The Witness: Fresno.

* * * * *

Q. (By Mr. Yeates): What is your present employment? A. California Compress.

Q. How long have you worked there?

A. About since 1951.

* * * * *

Q. Who is the supervisor over you?

A. Don Robinson. [13]

* * * * *

Q. Mr. Canty, have you ever been present at the company when any of the supervisors of the company who you know as supervisors by name made any statements to you or to other employees concerning union activities of the employees? [14]

A. I have.

Q. Do you recall when the first incident of any such statement took place?

A. The first time was when Mr. Young came in the smoke room.

Q. What date was that, or what month, if you know?

A. That was around November sometime. I don't know the day or the date.

Q. In what year was that? Was that last year?

A. 1957. No, let's see. No, that was this year. It was in November.

Q. 1957? A. That's right.

(Testimony of Abraham Canty.)

Trial Examiner: What is Mr. Young's first name?

The Witness: Larry.

Q. (By Mr. Yeates): Is that Lawrence Young?

A. Larry.

Q. You know him as Larry Young?

A. Yes, sir.

Q. What time of day was this?

A. Three o'clock smoke period.

Q. And where were you at the time?

A. In the smoke room.

Q. What statements, if any, did he make to the employees at that time?

A. Well, when he came in, he said, "I heard you guys wanted a union." [15] And he wanted to know what the union could do for us that we wasn't already getting. No one said a word.

And so he said, "If any of you fellows got any beef, come to me and talk to me." He said, "I won't charge you nothing." He said, "Why do you want to get someone to represent you and pay them?"

No one still said nothing. And when he got ready to leave, he said, "Is everybody happy?" And nobody said nothing.

And he said, "If any of you guys have any beef whatever, you come to me and I will be glad to talk it over with you at any time."

Trial Examiner: How many employees were there at that time?

The Witness: Oh, about forty or fifty.

(Testimony of Abraham Canty.)

Trial Examiner: And what was Mr. Young's job at that time, as far as you know?

The Witness: Superintendent.

Q. (By Mr. Yeates): Were any further statements made by Mr. Young to you at that time?

A. No.

Q. Was there any reference to signature cards by the employees?

A. Well, he said, "There was some fifty guys that signed up with the union." And at that time there was only fifty-eight men on the payroll and some fifty had signed cards, and he said he would find out who they were. [16]

Q. Where were you from Mr. Young at that time? How far from Mr. Young were you when he made that statement?

A. Well, about from me to where you are.

Trial Examiner: About how far is that?

The Witness: About two yards.

Q. (By Mr. Yeates): You would say about twelve feet or so, ten feet?

A. Something like that.

Q. That is what I would estimate my distance from you is. A. Yes, sir.

Q. Were any further statements made by Mr. Young to the employees at that time that you know of? A. Not that I know of.

Mr. Yeates: Could I have this marked for identification, please, as General Counsel's 2. [17]

* * * * *

Q. (By Mr. Yeates): Mr. Canty, I am going

(Testimony of Abraham Canty.)

to hand you what has been marked for identification as General Counsel's Exhibit 2 and ask you to look at this document, which is a photostatic copy of the original, and see if you have ever seen such a document before.

A. I have seen this before.

Q. And where did you see this document the first time?

A. This is the document Mr. Kuhns had.

Q. Mr. Kuhns? A. Yes.

Q. And will you state the circumstances of your seeing it and what, if any, statements were made to you regarding the document, General Counsel's No. 2, by Mr. Kuhns?

A. Well, I went in the office. He called me in the office, and he had it in there.

Trial Examiner: Who is "he"?

The Witness: Charlie Kuhns. And he told me he had a petition that he wanted to sign, and I asked him for what, and he said the fellows didn't want no union, and I told him I didn't want to sign it. And then Robinson said——

Q. (By Mr. Yeates): Is this Mr. Robinson your supervisor? A. Yes.

Q. All right. Go ahead.

A. He said, "If you haven't signed one of these union cards, [18] sign then. But if you have signed one of these union cards, don't sign it." He said, "If you signed a union card and didn't know what you was signing, sign that." So I told him I didn't want to be involved either way.

(Testimony of Abraham Canty.)

So he said——

Trial Examiner: Who said this?

The Witness: Then Kuhns said, "Well, the majority signed it already." So he pointed out several names to me. I saw the name of Shirley Richardson, Bonnie Merritts. Those was the only two men that signed it that knew what they was signing.

Trial Examiner: Signed what?

The Witness: The union card. I said, "Well, if I didn't sign the union card, why should I sign that? I don't want to be in bad with the company and be in bad with the union. If the union has an election, they can get back at me."

Then he said, "Well, there won't be no election." He said——

Trial Examiner: Who?

The Witness: Charlie Kuhns. He said, "Well, the best thing for you to do is sign this because there's not going to be no election. You have been with us a long time and we would hate to see you go." So I signed it.

Q. (By Mr. Yeates): Who made that statement to you? A. Charlie Kuhns.

Trial Examiner: Who was there besides you and Mr. Kuhns and Mr. Robinson? [19]

The Witness: Well, several more came in. Let me see. Benny Walls was one of them. I don't recall all of them that came in.

Q. (By Mr. Yeates): Did he make any reference to the company?

Trial Examiner: Who is "he"?

(Testimony of Abraham Canty.)

Q. (By Mr. Yeates): Mr. Kuhns or Mr. Robinson, did they make any reference to your position with the company if you signed or did not sign the document in question?

A. Well, Charlie Kuhns said if I didn't sign it, I would be in bad with the company. That was all, and so I signed it.

Q. And you then signed General Counsel's proposed Exhibit No. 2? A. Yes. [20]

* * * * *

Q. All right. Now, after you signed the General Counsel's Exhibit No. 2, was anything else said to you by either Mr. Kuhns or Mr. Robinson?

A. No.

Mr. Yeates: Will you mark this 3-A.

* * * * *

Q. (By Mr. Yeates): I am going to hand you what has been marked General Counsel's Exhibit No. 3-A for identification, and I will ask you to look at this, which is stated to be an application of the International Longshoremen's and Warehousemen's Union, and there is a signature appearing on there of Abraham Canty, dated 8/12/57, and I will ask you if you can identify that signature. A. Yes.

Q. And the date? A. Yes.

Q. Now, is this signature appearing on this General Counsel's 3-A your signature? [21]

A. My signature.

Q. And the date of 8/12/57? A. Yes.

Q. Do you know by whom the date was affixed?

(Testimony of Abraham Canty.)

A. No, I don't know about the date. I can't recall the date. I don't remember the date.

Q. Well, do you know whether or not you put the date there yourself, or did the person before whom you signed it in front of put the date there?

A. Well, I don't remember.

Trial Examiner: Well, do you remember when you signed it?

The Witness: Yes, I remember when I signed it.

Trial Examiner: When?

The Witness: That was in September.

Trial Examiner: Of what year?

The Witness: 1957.

Q. (By Mr. Yeates): And did you know what you were signing at the time you signed this card?

A. The application for the union.

Q. And did you know what the purpose of the card was for? A. Yes, to get a union.

Q. And was that your intention when you signed the card? A. Yes, that's right.

Q. Now, in your testimony, Mr. Canty, did you tell us whether or not you had read this document before you signed it? [22]

A. No, I didn't read it.

Trial Examiner: What document are you referring to?

Mr. Yeates: I am referring to General Counsel's Exhibit No. 2.

The Witness: That I did not read.

Q. (By Mr. Yeates): You did not read it?

A. No, sir.

(Testimony of Abraham Canty.)

Q. Did you understand the purpose of this document, General Counsel's Exhibit No. 2?

A. Well, I didn't understand it. He said——

Trial Examiner: Who is "he"?

The Witness: Mr. Kuhns. He said that would be the papers from San Francisco; the men that didn't want a union. [23]

* * * * *

DEAMOUR REASON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name?

The Witness: Deamour Reason.

Trial Examiner: And where do you live?

The Witness: I live at 2236 Holly.

Trial Examiner: In Fresno?

The Witness: Fresno, California. [33]

* * * * *

Q. (By Mr. Yeates): Mr. Reason, were you ever approached by anybody from the company with the document which has been marked in evidence as General Counsel's Exhibit No. 2?

A. Sure I was approached with that.

Q. Where were you at the time?

A. Well, I was—I went in the office. They asked for me to come in there and sign a card, sign this petition, and I told them "Yes." [35]

Q. Excuse me just a minute.

(Testimony of Deamour Reason.)

Do you remember on or about what date that was?

A. No, not exactly the date.

Q. What month?

A. In December somewhere.

* * * * *

Q. (By Mr. Yeates): Will you state what was said to you by Mr. Robinson at that time?

A. Well, he told me that he had a list there for me to sign, and he said, "If you sign this list, we want you to understand what you are doing." And so I didn't sign it. I went on back to work, to tell you the truth. I just went right on back to work. And then Mr. Young came down.

Q. And is this Plant Superintendent Young?

A. Yes. And he asked me did I sign the list he had in there, [36] and I told him, "No, I didn't sign it."

So he says, "Well, pretty near all the boys have signed."

I said, "Well, I know some of them haven't signed your list." I thought Benny hadn't signed it.

He said, "Benny already signed it."

Q. Is this Benny Walls? A. Yes.

Q. Is that W-a-l-l-s, Benny Walls?

A. That's right. He said, "I will get the list and let you look it over and you can see who all has signed it."

And I asked him, "Well, if I don't sign this list, will it cost me my job?"

And Mr. Young said, "Well, what I want to

(Testimony of Deamour Reason.)

know is the men that signed this union card." He said, "If I knew who they were, I would fire every one of them." [37]

* * * * *

Redirect Examination

Q. (By Mr. Yeates): Mr. Reason, you stated in your testimony that Mr. Young made a statement referring to those who had signed cards.

A. Sure.

Q. Now, in your testimony earlier you made a statement, during my examination, that he made a statement about those who signed this, if he knew, signed this document; is that right?

A. Yes. He said he would get rid of every one of them.

Q. And did he make that conversation at the same time with you? A. That's right. [62]

* * * * *

BENNY WALLS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name?

The Witness: Benny Walls.

Trial Examiner: What?

The Witness: Benny Walls.

Trial Examiner: How do you spell your name?

The Witness: B-e-n-n-y W-a-l-l-s.

Trial Examiner: Where do you live?

(Testimony of Benny Walls.)

The Witness: 2334 South Fruit Street.

Trial Examiner: Fresno?

The Witness: Fresno. [69]

* * * * *

Trial Examiner: Are you a lift truck operator?

The Witness: Yes, sir, machine operator.

Q. (By Mr. Yeates): That is the same as a lift operator? A. Yes, sir.

Q. Were you ever around when any supervisor for the company talked to any employees of the company concerning the union? A. Yes.

Q. In your work, Mr. Walls, does it take you into the yard?

A. Well, I'm all over, to tell you the truth.

Q. Well, in your work, what was the first time, if any, statements were made to you concerning the union?

A. Well, I heard Mr. Young talk to some of the boys.

Q. And by "some of the boys," who do you mean?

A. Well, it was Willie and James Mayfield. We was all out there in front. And he made remarks saying if we go union, that the block men will come out in the yard and take the jobs [71] there, and we will have to go home.

Q. Was anything further said?

A. Well, he said he knowed that the boys didn't want to go home or stuff like that, so the boys came and asked me——

Q. Wait a minute. Where was this statement

(Testimony of Benny Walls.)

made? A. Right in the yard there.

Q. And do you remember when this was made, what month? A. November.

Q. What time of day, if you know?

A. Something after nine.

Trial Examiner: What year?

The Witness: 1957.

Q. (By Mr. Yeates): November of 1957?

A. Yes.

Q. And you say this was out in the yard?

A. Yes. [72]

* * * * *

Q. How many were present at the time this statement was made?

A. Well, I seen about five or ten.

Q. And what was his statement to the employees then?

A. Well, he told the yard bunch that if they go union, the block bunch would come out and take the jobs, and they would have to go home, and they knowed they didn't want that kind of stuff.

* * * * *

Q. (By Mr. Yeates): I will show it to you and ask you whether you have ever seen the original of General Counsel's Exhibit No. 2, this being a photo-static copy. A. Yes.

Q. You have seen it? A. Yes, sir.

Q. Who first showed that document to you?

A. Mr. Kuhns.

Q. Mr. Kuhns? A. Yes, sir. [73]

Q. One of the supervisors? A. Yes, sir.

(Testimony of Benny Walls.)

Q. What, if anything, did he say to you at the time he presented the document to you?

A. Well, we was coming from the lunchroom, me and Abraham, and so——

Trial Examiner: Now wait a minute. In the first place, you and Abraham. Who is Abraham?

The Witness: Abraham Canty.

Trial Examiner: All right.

A. (Continuing): I was walking back from the lunchroom, me and Abraham was.

Trial Examiner: When was this?

The Witness: That was right after 1:00 o'clock.

Trial Examiner: I mean what day?

The Witness: December or—I don't know. Sometime in December.

Trial Examiner: Had you signed that?

The Witness: Yes.

Trial Examiner: You and Canty were walking back from the lunchroom?

The Witness: Yes. And Mr. Kuhns joined us as we was going back.

Trial Examiner: No, go ahead. Don't say "he." Mention them by name. [74]

A. (Continuing): So Mr. Kuhns asked me whether I read or signed a paper, and I said, "What paper?"

And he said, "This petition."

And so I said, "I don't think I signed it. All the rest of the boys signed it."

He said, "Well, you better sign it and get it over with."

(Testimony of Benny Walls.)

I said, "Well, I will see you after while."

So I went in the door and when I left, I told Kuhns, "I will see you," and so I went on out.

So I seen Kuhns with the list that the boys signed, and I was called in again about 3:30 and Kuhns was still in there.

Q. (By Mr. Yeates): Was this in the office?

A. Yes, sir. Kuhns was still in the office. And so he asked me, "Are you still ready to sign it?"

I said, "Wait until all of them sign it and then I will sign it." I said, "I don't know what I am signing." I said, "It may mess me up."

He said, "Oh, no, it won't."

I said, "Well, I will sign it before I go home." So I went out, and I didn't have no more work until I got ready to go home. I came in about 4:50 or something like that; he said, "This is your last chance."

And I said, "Well, I think I will sign it now."

And he said, "Well, you better sign it."

And so I signed it, and I went right on home. It was right after 5:00. [75]

Q. After you signed the document, did anybody from the company make any statements to you?

A. Yes.

* * * * *

A. The next morning I went in the office to get my next lot of cotton, and Larry Young met me.

Q. Is this the plant superintendent?

A. Yes.

Q. All right. Go ahead.

(Testimony of Benny Walls.)

A. He said, "I heard you and Kuhns had an argument about signing the petition."

I said, "Yes, we had, but I signed it."

He said, "Well, if you was the number one man, you would sign it."

So I signed it. [76]

* * * * *

Q. (By Mr. Yeates): This marked General Counsel's Exhibit No. 4 for identification. I am going to hand you this and then ask you a question about it. It is an application for the International Longshoremen's and Warehousemen's Union. There appears on there the date of 8/6/57 and a signature at the bottom which states "Benny Walls." Is that your signature? A. Yes, sir.

Q. And was it dated the same day you signed it?

A. Yes, sir.

Q. You recall that? A. Yes, sir.

Q. Do you know what the nature of this General Counsel's No. 4 was when you signed it, this application?

A. When I signed it, I knowed what I was signing because I wanted a union, and I signed it.

* * * * *

Q. (By Mr. Yeates): When you signed the petition, had you then, in fact, already signed a union application card? A. Yes, sir.

Q. Why did you then affix your signature to the petition?

A. Well, I just seen the rest of them sign it, and I just fell in line.

(Testimony of Benny Walls.)

Q. What, if anything, had been explained to you about this petition and by whom?

A. Well, nobody explained nothing to me. I didn't even read it. I just asked questions about it, and he figured the union was putting something over on him, and they wanted us to sign it. But I waited until close to 5:00 o'clock before I signed it. I asked him how many signed it.

He said, "Well, about twenty more men would sign in the morning."

So I said, "Well, I will sign mine now."

Q. At the time you signed this, you knew you had signed a union card? A. Yes, sir.

Q. Could you state why you affixed your signature to the petition? A. This?

Q. Yes.

A. Well, I was kind of scared. I had to.

Q. You say "scared." What do you mean by "scared"? [78]

A. I didn't want to lose that bread.

Q. When you say "bread"—

Trial Examiner: Now, wait a minute.

A. Well, I didn't want to get laid off. I figured if I didn't sign it, I would get laid off. That's why I signed it.

* * * * *

Cross-Examination

Q. (By Mr. Avery): Mr. Walls, did anyone tell you before you signed Exhibit No. 2 that you would be laid off if you didn't sign it? A. No.

Q. Now, Mr. Walls, the next day after you had

(Testimony of Benny Walls.)

signed this document, you had a conversation with Mr. Lawrence Young, the superintendent; is that correct? A. That's right.

Q. Tell me, what time of day was it that you spoke to him?

A. It was just a little after 8:00 in the morning.

Q. Just a little after 8:00 in the morning?

A. Yes.

Q. Now, this is the next day after you signed?

A. That's right. [79]

Q. Now, where was it?

A. We was just about fifteen feet out of the office when I met Mr. Young coming into the office.

Q. What were you doing at that time?

A. I was taking another sheet of paper out to get my next lot.

Q. Was anybody else present when Mr. Young talked to you?

A. Not at the time I was going out.

Q. That is the time Mr. Young made the statement to you? A. That's right.

Q. If you hadn't signed it before, he would have fired you; is that right? A. That's right.

* * * * *

Q. Were you present at a time when Mr. Young was talking to Mr. Deamour Reason?

A. Well, I was close by.

Q. You were close by? A. Yes.

Q. What time of day was that?

A. I don't know exactly. I don't recall exactly what time it was, [80] but I was right close by

(Testimony of Benny Walls.)

when Mr. Young was talking to Deamour Reason, because I always like to get up and hear everything. And so I signed because he was kind of mad at me for signing it. [81]

* * * * *

Q. (By Mr. Avery): What did you hear Mr. Young say to Mr. Reason, and what did you hear Mr. Reason say to Mr. Young at approximately nine o'clock on that day?

A. I couldn't hear everything, but I heard the discussion, you know. I could hear Mr. Young say to Mr. Reason——

Trial Examiner: You just tell us what you remember.

Q. (By Mr. Avery): Just tell us what you remember.

A. I heard him say that if he knowed the men that signed the petition, that he would lay them off.

Trial Examiner: The petition or the application?

The Witness: The application. But I wasn't close enough to hear everything.

Q. (By Mr. Avery): You heard that, though?

A. Yes.

Q. You are sure of that? A. Yes, sir.

Q. Now, Mr. Walls, are you afraid or frightened of Mr. Reason?

A. No. He was just talking to me.

Q. But you are frightened of the union?

A. What? [82]

Q. You are frightened about the union?

(Testimony of Benny Walls.)

A. Well——

Q. Aren't you afraid they will do something to you unless you testify this way today?

A. No.

Q. You told one of the supervisors you were frightened of the union?

A. No. I couldn't be frightened because I want the union?

Q. You want the union? A. Yes.

Q. Did you ever tell one of the supervisors that you were frightened of the union? A. No.

Q. That you were afraid of being beaten up unless you testified this way today? A. No.

Q. You are sure you didn't tell them that?

A. No, I'm not afraid of the union because I was one of the main ones who wanted a union.

Q. Isn't it true that you told one of the supervisors that you were afraid of the union?

A. No, I am not afraid of the union. [83]

* * * * *

Q. Now, Mr. Walls, were you present at a meeting in a boiler room or a smoke room sometime in November of 1957 when Mr. Young talked to all of the men? A. I was.

Q. Now, was that on the same day that you were telling us about when you were out in the yard and there were five to ten men present?

A. No.

Q. That was on a different time? A. Yes.

Q. How many days apart were these two meetings? A. Well, I couldn't recall.

(Testimony of Benny Walls.)

Trial Examiner: About. Which came first?

The Witness: Talking in the smoke room was last.

Q. (By Mr. Avery): That was the last thing that happened? A. Yes.

Q. All right. So this meeting in the yard that you had was some days prior to the meeting in the smoke room? A. That's right.

Q. Is that correct?

A. That's correct. [85]

* * * * *

Q. Now, tell me what you did hear in the boiler room or smoke house.

A. Well, I heard that in the boiler room he said if he knowed the ones that signed it, you know—I don't know exactly what all he did say.

Q. The words you are trying to say, I presume, Mr. Walls, are that if he could find out the men that signed the cards, he was going to fire them? That is what you intended to say, isn't it?

A. No.

Q. It was not? A. No. [86]

Q. You tell me what you intended to say.

A. Well, it was in the boiler room, but he did say if the men wasn't satisfied, why, he could help them to another job.

Q. If the men weren't satisfied, he would help them to another job? A. Yes.

* * * * *

Q. Now, at this conversation in the yard several days before the meeting in the smoke house,

(Testimony of Benny Walls.)

as I understand it, Mr. Young said something like this: "If the plant goes union, the yard boys will have to go home because the block boys will take over their jobs"; is that approximately it?

A. That's right. The block boys will come out and take the jobs, and they don't want that kind of stuff because they will have to go home.

Q. Did you understand what he meant by that?

A. Yes.

Q. What did he mean by that? [87]

A. He meant if we all went union and if they vote for the union and lose it or win it, that means they will go home. The block boys will come out there in the yard and take over.

Q. Did Mr. Young at that time state where he had heard that you were trying to go union, or did he mention that he heard you were going union?

A. He talked to me several times about he heard the boys trying to go union, but I told him they didn't want to go union, but I knowed all the time they did. [88]

* * * * *

BONNIE MERRITTS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your full name, sir?

The Witness: Bonnie Merritts.

Trial Examiner: Will you spell that for the reporter, please?

(Testimony of Bonnie Merritts.)

The Witness: B-o-n-n-i-e M-e-r-r-i-t-t-s.

Trial Examiner: And where do you live, sir?

The Witness: 105 Stanislaus, Fresno.

* * * * *

Q. (By Mr. Yeates): What is your employment at the present time?

A. Well, I am not working at the present time. I was laid off on the 4th of March at the California Compress Company.

Q. How long did you work at California Compress?

A. Well, ever since the California Compress has been there, except last fall when I didn't work on account of sickness. [119]

Q. Did anybody from the company approach you with a petition which we have introduced in evidence as General Counsel's Exhibit No. 2 and a copy of which is before you? A. Yes.

Q. Who approached you on that?

A. Mr. Kuhns.

Q. What statements did he make to you in reference to the document?

A. Well, he came up and said—wait a minute. He said, "I got something I want to tell you all or show you all." He had a list of printed names on it; actually a whole bunch of names. He held the list out.

And I said, "Where did this list come from?"

He said, "It was made up in the office."

I said, "Well, that's fine."

He said, "All I want to know is if you did sign

(Testimony of Bonnie Merritts.)

for the union, don't sign this list; if you didn't sign for the union, sign this list."

I said, "Well, I signed for the union."

He said, "Well, that don't involve you, then."

That's all there was to that.

Q. After that time did anybody again speak to you about the petition? A. Yes.

Q. Who was that? [120]

A. Mr. Kuhns. I met him at his office the same day. I met him at the door, and he said to me, "If I were you, at your age, I would take my name off and tell them I didn't know what I was signing."

I said, "Well, I knew what I was signing."

And he said, "Well, if I were you, at your age, I would take my name off and tell them I didn't know what I was signing."

And I told him I knew what I was signing, and I said, "It don't make no difference to me."

And that's all there was to that.

Q. Did that end the conversation?

A. That ended the conversation.

Q. How old are you?

A. I will be sixty-five next month. I mean the first of May. [121]

* * * * *

Redirect Examination

Q. (By Mr. Yeates): When in reference to the conversation you had in Mr. Kuhns' office after he had first approached you with the paper you said

(Testimony of Bonnie Merritts.)

you noted did he—would you state again what he said to you at that time?

A. Well, all I can remember definitely is that he said—he was telling the samplers, “If you get a union, the block crew is liable to come out here and take your job when the work is slack for the block men.”

And one of the samplers, Frank Lopez, said, “Well, we are supposed to be cotton cutters. How are they going to take our job?”

And he said, “Well, they got some cutters in there and don’t think they can’t come in here and do your work.”

Q. Who was that statement made by?

A. Mr. Kuhns.

Q. And where was that statement made?

A. In his office.

Q. Now, you have stated earlier that Mr. Kuhns stated to you something about changing your mind because of your age?

A. Yes.

Q. What statement did he make to you at that time?

A. He said, “If I were you, I would go down and have my name taken off because of your age and tell them you didn’t know [127] what you were signing.”

And I told him I knew what I was signing and that it didn’t make any difference to me.

Trial Examiner: Taken off what?

The Witness: Off that list that was being signed for the union.

(Testimony of Bonnie Merritts.)

Q. (By Mr. Yeates): And this was at a different time? A. Yes.

* * * * *

WILLIE D. ROSS

a witness called by and on behalf of the General Counsel, being [128] first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: Will you state your full name?

The Witness: Willie D. Ross.

Trial Examiner: Willie, how do you spell that?

The Witness: W-i-l-l-i-e.

Trial Examiner: And Ross?

The Witness: R-o-s-s.

Trial Examiner: And where do you live?

The Witness: 1751 E Street, Fresno.

* * * * *

Q. (By Mr. Yeates): You were employed at California Compress in 1957? A. Yes, sir.

* * * * *

Q. (By Mr. Yeates): And the petition in front of you, the photostatic copy there, were you approached by somebody from the company concerning that document? A. Yes, I was.

Q. Do you recall about when that was? [129]

A. I think it was a little before noon on the 6th of December.

Q. And who approached you with the document?

A. Well, there was my supervisor, Mr. Hayes, and Mr. Charlie Kuhns.

(Testimony of Willie D. Ross.)

Q. The document I refer to is——

Trial Examiner: Did you say Hayes?

The Witness: Yes.

Trial Examiner: How do you spell that?

Mr. Yeates: H-a-y-e-s, I believe.

Q. (By Mr. Yeates): What statement, if any, did Mr. Hayes make to you about the document in question?

A. Well, he said, "I want you to sign this paper."

And I asked him what it was, and he said, "Well, you don't have time to read it." He said, "I will explain it to you." So he went on to explain it. He said, did I sign a card for the union. And so I said, "Well, I signed a paper." I said, "What does this paper concern?"

Mr. Charlie Kuhns said, "It's whether you are for the union or not."

I said, "Well, regardless of whether we go union or not, I am here to do a job and that's what I'm going to do." And then Mr. Hayes went on and explained to me that it was said that I didn't know what I was signing when I signed it. He explained it to me like that.

Trial Examiner: He said you didn't know what you were [130] signing?

The Witness: That I didn't know what I was signing the paper, the paper for the union, so I went on and signed the paper.

Q. (By Mr. Yeates): And after that, you signed the paper? A. That's right.

(Testimony of Willie D. Ross.)

Trial Examiner: And what job you say Hayes has?

The Witness: He supervises the field.

Q. (By Mr. Yeates): I will show you what is marked for identification General Counsel's Exhibit No. 6, which is an application for the union in question, and I will ask you if this is your signature?

A. That's right.

* * * * *

Q. (By Mr. Yeates): And the date, 10/22/57, do you know whether or not that was on the card when you signed it? A. Well——

Q. Was that the date when you signed the card?

A. No, I don't think I signed it on that date, but I know that's about when I signed the card, in October.

Q. That would be about the time you signed it?

A. That's right.

Q. Now, when you signed this, did you know what purpose this [131] card was for?

A. Yes.

Q. What was your understanding?

A. I knew it was to get the union in.

Q. What was your reason for signing the affidavit here?

A. Well, I figured it would be a threat to my job if I didn't sign it.

* * * * *

Cross Examination

Q. (By Mr. Avery): Mr. Ross, Mr. Hayes had

(Testimony of Willie D. Ross.)

this original of Exhibit No. 2 with him, didn't he, when he asked you to sign it?

A. Yes. This is the same paper because I knew there was about seven in front of me when I signed the paper, seven names.

Q. You remember that document?

A. Yes, sir.

Q. Did you read it before you signed it?

A. No, I didn't.

Q. Are you able to read? A. That's right.

Q. Now, did Mr. Hayes, when he explained what the document was, say that if you sign this, that what you are saying is that you didn't know what you were signing at the time you signed the union authorization card, which is General Counsel's Exhibit [132] No.—

Trial Examiner: 6.

* * * * *

The Witness: That's right.

Q. (By Mr. Avery): Now, you knew when you signed this document that you were, in effect, saying you didn't know what you were doing when you signed this card; is that right? A. Yes.

Q. Now, did you tell Mr. Hayes that you didn't know what you were signing when you signed this authorization card? A. No, I didn't tell him.

Q. But you signed your name after he told you that is what you were signing?

A. That's right.

Q. Now, in other words, what you were signing

(Testimony of Willie D. Ross.)

was an untrue statement; now, why did you do that?

A. Because I figured it was a threat to my job.

Q. You figured it was a threat to your job?

A. Yes. [133]

* * * * *

Mr. Yeates: Yes. On this petition, which has now been marked General Counsel's 7-A, B and C, it shows the date filed as 11/6/57. 7-B is the notice and the service of this document, and I will ask the Respondent if he will stipulate that they did receive a copy of this.

Mr. Avery: Let me see the copy that you are referring to.

Mr. Yeates: What I am referring to is the notice of representation hearing.

Mr. Avery: Counsel, we haven't been able to ascertain yet whether we did receive it or not, and we are trying to check.

Mr. Leonard: May I say on the record, Mr. Trial Examiner, that after we filed the petition on November 6, 1957, and on the same date—on the next day, November 7, 1957, there was the usual formal letter that we received from the Petitioners' office saying who the investigating officer would be and that we would be contacted. I assume a similar letter under the date of November 6, 1957, went to the employers as well.

Mr. Yeates: Does the employer have a copy of that letter?

Mr. Doty: We have a copy of the forms, but not the letter, for some reason or other. [139]

Trial Examiner: Well, will you stipulate, that is, after you find your files, that on or about November 12 or 13—I say November 12 or 13 because November 11 was a holiday, Armistice Day, that you received a copy of the petition in the representation case?

Mr. Doty: Oh, yes, we will stipulate that we received a copy of the petition.

Trial Examiner: On or about those dates?

Mr. Avery: Yes.

Trial Examiner: Now, did you get a copy of the notice of hearing?

Mr. Doty: Yes.

Trial Examiner: On or about what date? What is the date of the notice of hearing?

Mr. Doty: On or about the 22nd, I would assume.

Mr. Yeates: The 21st of March.

Trial Examiner: The 21st of what?

Mr. Yeates: The 21st of November is the date for the notice of hearing.

Mr. Avery: We will stipulate we received it in the course of mail in the usual number of days after it was dated.

Trial Examiner: That you received the notice of hearing in the representation case, that is to say, Case No. 20-RC-3427, in the usual course of the mail on the 22nd of November, 1957, or within a day or two? [140]

Mr. Doty: On or about.

Mr. Avery: On or about, yes. I am not sure whether the 22nd was a holiday or not.

Trial Examiner: I know, and that the notice set the hearing down for December 10, 1957; is that right?

Mr. Avery: Yes.

Trial Examiner: Do you gentlemen stipulate to all the facts that the Respondent has stipulated to?

Mr. Yeates: I will stipulate.

Trial Examiner: With respect to the time and the service and the receipt of the copy of the petition and the notice of the hearing?

Mr. Yeates: That is correct.

Trial Examiner: How about you, Mr. Leonard?

Mr. Leonard: Yes, sir. And on behalf of the Charging Party, we also received those notices as indicated.

* * * * *

LLOYD WILLIAMS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your full name, sir?

The Witness: Lloyd Williams. [141]

Trial Examiner: Will you kindly spell your name for the reporter?

The Witness: L-l-o-y-d W-i-l-l-i-a-m-s.

Trial Examiner: And where do you live, sir?

The Witness: 204 West Amador.

Trial Examiner: Fresno?

(Testimony of Lloyd Williams.)

The Witness: Yes, sir.

* * * * *

Q. (By Mr. Yeates): Were you employed at the California Compress Company in 1957, during 1957? A. Yes, sir.

Q. And during the period which is in question here, October, November and December of 1957, were you employed there?

A. What was that question?

Q. Were you employed in October, November and December of 1957 at the company?

A. Yes.

* * * * *

Q. And you have heard the prior testimony in the courtroom concerning a meeting in the smoke room in which Mr. Young made statements to certain employees? A. I did. [142]

Q. Were you present at the time that meeting took place? A. Yes, I was there.

Q. Will you state what, if any, remarks were made by Mr. Young that you heard?

A. Well, I heard him ask the men how many of them wanted a union, and none of them answered, and then he said he knew that about fifty men had signed up for the union, but he didn't know who they were.

And he said, "If you aren't happy on the job you have, well, I can fix it up for you." He would see to it that you got a job personally. He stated that he was paying us and not the union.

Q. Now, was there any statement made in ref-

(Testimony of Lloyd Williams.)

erence to cards signed or the number of employees signing cards?

A. Yes. He said he knew about fifty men had signed up for the union, but he didn't know who they were.

* * * * *

Q. (By Mr. Yeates): This is the original of General Counsel's Exhibit No. 2. I will hand this to you and ask you if you have ever seen this affidavit or document before. [143] A. Yes.

Q. Who handed it to you?

A. Henry Hayes.

Q. Did he make any statement at the time he handed it to you?

A. No. He just said it was something that Larry wanted us to sign, and he said we didn't have anything to worry about.

Q. When he said "Larry," did you know who he was referring to?

A. Superintendent Larry Young.

Q. Did you then sign the document?

A. Yes, I signed it.

* * * * *

Q. (By Mr. Yeates): I will hand this to you. It is a union application card, with the signature of Lloyd Williams on the bottom, and I will ask you if this is your signature. A. Yes, sir.

* * * * * [144]

Q. (By Mr. Yeates): There is a date appearing at the top of this, 10/21/57. Was the date on

(Testimony of Lloyd Williams.)

the card at the time you signed, or do you know by whom it was affixed, put on there by?

A. Well——

Q. Was this about the time you signed the card?

A. It was sometime in November or October when I signed the card.

Q. Sometime in November or October when you signed the card? A. Yes.

Q. Did you know the purpose of the card when you signed it? A. Yes.

Q. And what was the purpose?

A. For the union.

Q. Did you read the petition in question?

A. No.

Q. Did anybody read it to you? A. No.

Q. Did you know what the contents of the petition were—— A. No.

Q. (Continuing) ——At the time you signed your name to it?

A. No, I didn't know what it was for.

Mr. Yeates: That's all.

Mr. Leonard: May I ask a question or two?

Trial Examiner: Surely.

Q. (By Mr. Leonard): Mr. Williams, if I understand it, Mr. Hayes brought that petition to you, Exhibit No. 2? [145] A. Yes.

Q. And he is your immediate supervisor?

A. Yes.

Q. And he said that Larry wanted you to sign it? A. Yes.

Q. And Larry is the plant superintendent?

(Testimony of Lloyd Williams.)

A. Yes.

Q. In the years you have been working at this company, has Mr. Hayes or any other plant supervisor brought you a document and told you that the company wanted you to sign it? A. No.

* * * * * [146]

WINSTON HANDWERKER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Winston Handwerker.

Trial Examiner: Will you spell that, please?

The Witness: W-i-n-s-t-o-n H-a-n-d-w-e-r-k-e-r.

Trial Examiner: And where do you live, sir?

The Witness: 910 Pico, Fresno. [153]

* * * * *

Q. (By Mr. Avery): Mr. Handwerker, are you in any way connected with California Compress Company, Inc., the Respondent in this matter?

A. Yes, I am.

Q. What is your position with the company?

A. General Manager.

Q. How long have you been employed by California Compress Company, Inc.?

A. Six years.

Q. Prior to its being incorporated, were you also with that company while it was a partnership?

A. That's right.

(Testimony of Winston Handwerker.)

Q. And six years embraces both the partnership and the incorporation? A. That's right.

Q. Now, Mr. Handwerker, did you receive in the course of the mail the documents which are General Counsel's Exhibit No. 7? A. Yes, I did.

Q. Referring to the first of those documents in date, the petition dated the 6th, did you in the course of the mail shortly after November 6, 1957, receive that petition? A. Yes, I did. [154]

Q. What did you do upon receiving that petition?

A. I called Paul Doty, if I remember correctly, to advise him that we had received this petition.

Q. Who is Paul Doty?

A. An attorney associated with the firm of Doty, Evans & Quinlan, I believe.

Trial Examiner: You mean the company's attorney?

The Witness: He is——

Trial Examiner: One of them?

The Witness: Yes, one of our attorneys.

Q. (By Mr. Avery): And where were you able to contact Mr. Doty?

A. As I remember, he was in San Francisco at the time.

Q. What was the purpose of your calling Mr. Doty?

A. The purpose was to ask Paul if it was possible to ascertain whether or not these signature cards were forgeries, inasmuch as I doubted seri-

(Testimony of Winston Handwerker.)

ously if a sufficient percentage of the employees had signed cards requesting a union.

Q. Requesting a union? A. That's right.

* * * * *

Q. (By Mr. Avery): Now, the signature cards you refer to are the signature cards that Mr. Doty had informed you were the basis for the statement in the petition that there was an adequate representation, that the union did have a sufficient number [155] of employees to represent it?

A. That's right.

* * * * *

Q. (By Mr. Avery): Now, you didn't believe it could be possible that there was any such number of your employees who wished to join the union?

A. I did not.

* * * * *

Q. (By Mr. Avery): Mr. Doty informed you that he had the information that there were signature cards signed by approximately 80 percent of your employees at that time?

A. That's correct.

Trial Examiner: Well, now, wait. You called Mr. Doty in San Francisco——

The Witness: Yes. [156]

Trial Examiner: ——when you received this petition?

The Witness: Yes.

Trial Examiner: And you told him you received this petition?

The Witness: Yes.

(Testimony of Winston Handwerker.)

Trial Examiner: And he told you all this at the same time?

The Witness: Not at the same time.

Trial Examiner: Did he call you back?

The Witness: He called me back.

Trial Examiner: All right.

The Witness: I asked him——

Trial Examiner: To ascertain what the situation was?

The Witness: That is correct; he called me back and gave me these facts.

Trial Examiner: All right. And he was still in San Francisco?

The Witness: That is correct.

Trial Examiner: Did he tell you that he talked with someone from the National Labor Relations Board?

The Witness: He said he talked with someone in the National Labor Relations Board who could verify these statements.

Trial Examiner: All right. I just wanted to clear up this thing for you.

Q. (By Mr. Avery): Now, why didn't you believe that was possible, the information that Mr. Doty advised you of?

A. Well, number one, in December of 1956—I think it was [157] December—we had had an election, or sometime in 1956 prior to December we had an election, and the employees had voted against a union.

Trial Examiner: Well, that was another union?

(Testimony of Winston Handwerker.)

The Witness: It was another union, but nevertheless they had voted against a union, and it was my information that the employees were not desirous of having a union at that time.

Trial Examiner: Well, may I ask this question of the witness, Counsel: Was that a National Labor Relations Board hearing?

The Witness: Yes, it was.

Mr. Avery: I was about to state—I don't want to encumber the record. I just want to state to the Trial Examiner that that was Case No. 20-RC-3174, which records will be available to the Trial Examiner.

Trial Examiner: What was the union in that case?

Mr. Avery: The union in that case was the International Chemical Workers Union, Local No. 97, AFL-CIO. [158]

* * * * *

Q. (By Mr. Avery): Now, what were your other reasons in addition to the fact that this election determined that these employees did not want this particular union?

Mr. Leonard: In December 1956.

A. From December 1956 up until the time that I received this petition, all that information—all of the information that I had available pointed to the fact that the employees were perfectly satisfied with their present setup, and that we had had statements volunteered to us stating that the employees did not want a union.

(Testimony of Winston Handwerker.)

Q. (By Mr. Avery): Yes. Now, with that background, did you consult subsequently to this phone call to Mr. Doty, Mr. Doty and myself, as to the procedure that could be employed by the California Compress Company, Inc., to verify your belief? A. Yes, I did.

Q. I show you, Mr. Handwerker, a document which now bears signatures and which is the original of General Counsel's Exhibit No. 2 and ask you if I presented you with that document, unsigned of course? A. Yes, you did. [159]

* * * * *

Q. (By Mr. Avery): And did I give you instructions regarding its circulation?

A. Yes, you did.

Q. Now, based upon the advice of Counsel and those instructions, what did you do with that document and why did you do it?

A. The first thing I did was to call Lawrence Young, the plant superintendent, into my office. I showed him the document and I had him read the document, and when he had finished, I explained to him exactly what it meant and asked him if he would meet with the foremen, the plant supervisors under his direction, and explain the document to them and ask them if they could see any reason why the men would object to his circularizing this document. [160]

* * * * *

Cross Examination

Q. (By Mr. Leonard): Mr. Handwerker, as I

(Testimony of Winston Handwerker.)

understand it, you first received the petition for representation filed by the ILWU on or shortly after November 7, 1957; is that right?

A. Approximately.

Q. And as soon as you received it, you called Mr. Doty who was in San Francisco? A. Yes.

Q. You asked Mr. Doty if it were possible to ascertain whether or not the signature cards were forgeries? Is that what you asked him to do?

A. I told Mr. Doty that I was astounded to receive such a petition and thought, frankly, that I—frankly, I doubted that enough cards had been signed by employees to justify the issuance of a petition.

Q. And what did Mr. Doty tell you when you told him that?

A. He stated that in his opinion they must have—the National Labor Relations Board must have had enough cards to authorize the issuance of this petition, at which time I stated, that being the case, I would like to investigate the possibility of checking the signatures on the cards, because I doubted that they were authentic.

Q. Did Mr. Doty tell you anything in response to that?

A. He said he would check and see what the proper procedure [168] would be.

Q. And then did you have some further communication with him? A. On what date?

Q. At any later time. A. Oh, yes.

(Testimony of Winston Handwerker.)

Q. And when did Mr. Doty call you? Was it the same day or the following day?

A. I think it was the following day.

Q. Did he tell you that he checked with the National Labor Relations Board?

A. He said he checked and that there were cards on file indicating that approximately 80 percent of our employees had signed these cards.

Q. Did he say anything further to you?

A. Not that I recall.

Q. Didn't Mr. Doty tell you that it was the policy of the National Labor Relations Board that such matters as you were asking him to inquire into were administrative matters and that the determination of representation was to be by secret ballot election? Didn't Mr. Doty tell you that in substance or effect, if not in my own words?

A. What was that again, please?

Trial Examiner: Will the reporter kindly read the question?

(Question read.)

A. Mr. Doty did not tell me that. [169]

Q. (By Mr. Leonard): He did not?

A. No.

Q. Did he tell you anything like that?

A. Well, I knew if there was an election to be held that it would be supervised by the National Labor Relations Board and that it would be a secret ballot.

Q. Because your company had gone through at least one prior election?

(Testimony of Winston Handwerker.)

A. That would be one way of finding out.

Q. You knew generally from your experience, then? A. Yes.

Q. When the Chemical Workers filed a petition back in 1956, Mr. Handwerker, did you cause to be circulated a document such as General Counsel's Exhibit No. 2 at that time? A. No.

Q. This is the first time in the history of your company you have done anything like this; isn't that right? A. That is correct.

Q. Mr. Handwerker, you stated in response to a question by your counsel that you did not believe your employees signed these cards; is that right?

A. That's right.

Q. And I think you stated there were two reasons for your disbelief on this point: One, in December of 1956, a year earlier, the employees voted against the Chemical Workers Union; [170] is that right? A. Yes.

Q. And the second reason was that you said it was your information the employees were not desirous of having a union; is that right?

A. Yes.

Q. Where did you get that information?

A. I make it a policy to try to know what is going on at all times.

Q. Where did you get that information?

A. I got that information from my superintendent.

Q. Do you have a policy of having your superintendent report to you about elections?

(Testimony of Winston Handwerker.)

A. The policy of the California Compress Company is to know at all times what our foremen, our supervisors, our employees—to know whether they are content.

Q. Is it the policy of the California Compress Company to know at all times what the employees' desires are with respect to unions?

A. If they want to volunteer that information, we have to listen to it.

Q. I appreciate that. Is it the policy of the company, if the employee wants to volunteer it—

A. If they want to volunteer it, we are happy to listen to it. That is the policy of the company.

Q. And if they do not volunteer it, how do you get the information?

A. We wouldn't be able to get the information.

Q. And which of your employees advised you that the other employees were not desirous having an election?

A. I think you heard Mr. Walls say that the men did not want a union. That is the only man I know.

Q. That is the only man you know?

A. Yes.

Q. Was it on the basis of the statement of Mr. Walls that is in the record that you formed your conclusion that the employees were not desirous of having a union? A. No.

Q. On what other basis did you form your conclusion?

A. On the information I received from the su-

(Testimony of Winston Handwerker.)

perintendent and the opinion of the supervisors that the men did not want a union.

Q. And your superintendent—that's Mr. Young?

A. That's right.

Q. Did he tell you the source of his information? A. No, he didn't.

Q. Did any of the other supervisors tell you the source of their information? A. No.

Q. They simply gave it to you as their opinion or conclusion [172] that the men didn't want a union, and you simply took that?

A. That is right.

Q. Without probing any further?

A. That is correct.

Q. Did you discuss with Mr. Doty or Mr. Avery early in November or the middle part of November right after the petition—the representation was filed, whether you should dispose of that representation case by having a consent election, agreeing to an election? Was that the consideration at one time?

A. Will you read the question, please?

Trial Examiner: Read the question, please, Mr. Reporter.

(Question read.)

A. Right after Exhibit 2 was circularized, we considered having the election. As a matter of fact, we consented to it.

Trial Examiner: You mean that is after November 4th or 5th?

The Witness: No.

(Testimony of Winston Handwerker.)

Trial Examiner: I mean December 4th or 5th?

The Witness: That is correct. On approximately the 7th or the 8th is when we consented to it. [173]

* * * * *

Q. (By Mr. Leonard): Mr. Handwerker, do you recall whether Mr. Avery was first called in on this matter before or after the National Labor Relations Board issued its notice of hearing?

Trial Examiner: In what case?

Q. (By Mr. Leonard): In the representation case.

A. What was the date of the notice of hearing?

Q. The date of the notice of hearing is November 21. I assume it was received on November 20th.

A. I don't recall the exact date he was called in.

Q. Was it about that time?

A. I could ascertain the date, but I don't recall.

Trial Examiner: Have you got any papers in the hearing room?

The Witness: Have you got any?

Mr. Avery: Yes.

Mr. Leonard: I will be very happy to stipulate with you, Counsel, if you will tell us what the fact is.

Mr. Avery: Yes. I can quote from it in affidavit form. [175]

Trial Examiner: What date was that?

Mr. Leonard: I don't have a copy of it.

Mr. Avery: It was on or about November 27, 1957, that I was first called into the matter by Mr. Handwerker.

* * * * *

(Testimony of Winston Handwerker.)

Q. (By Mr. Leonard): When Mr. Avery was called in this matter, you discussed with him, did you not, that there was an election coming up because the Labor Board had ordered a hearing?

A. I discussed with him the petition that I had received.

Q. Did you tell him there was a hearing set for December 10th?

A. I don't recall that I told him there was a hearing set for December 10th. I didn't tell him that.

Trial Examiner: What did you tell him?

The Witness: I told him that I received the petition.

Trial Examiner: Is that all?

The Witness: And I probably sent him a copy of it.

Q. (By Mr. Leonard): You retained Mr. Avery to represent you [176] as your legal counsel in this matter; is that correct? A. That is correct.

Q. Did you tell your legal counsel that you received a notice from the National Labor Relations Board that there was going to be a hearing on December 10th?

A. I don't recall that I mentioned the date to him.

Q. I see. Did you tell him that the National Labor Relations Board had ordered a hearing?

A. I told him I received a petition for an election.

(Testimony of Winston Handwerker.)

Q. Did you tell him that the National Labor Relations Board had ordered a hearing?

A. I don't recall.

Q. So you called Mr. Avery into the case to be your counsel, but you didn't tell him there was a hearing coming up in about two weeks?

A. I told him there was a hearing on an election.

Trial Examiner: Now, you received that two weeks before. What did you tell him when you retained him on November 27?

The Witness: I don't recall the exact conversation, but I am sure I told him that we had—that the union claimed representation and that I doubted the authenticity of the signature cards, if they had them on file. They evidently had them on file in the National Labor Relations Board office in San Francisco, but I just could not believe——

Trial Examiner: Did you tell him that the matter was [177] coming up for a hearing?

The Witness: I don't recall.

Trial Examiner: Did you send him all the papers you received from the Board?

The Witness: I am sure I did.

* * * * *

Q. (By Mr. Leonard): Did you discuss with Mr. Avery or Mr. Doty the fact that if these signature cards were forgeries or if the employees [178] really didn't want a union, they could vote against the union in a secret ballot election?

A. Did I discuss that with Mr. Avery?

Q. Or Mr. Doty.

(Testimony of Winston Handwerker.)

A. No, I don't recall discussing that with them.

Q. Did you discuss with Mr. Avery or Mr. Doty the possibility of doing something to stop the election?

A. No.

Q. Or to stop the hearing?

A. I don't know what you mean by trying to stop it.

Q. To prevent the hearing from going forward.

A. I merely discussed with them the fact that I doubted that these cars were authentic.

Q. And you doubted that your employees wanted the union; isn't that correct?

A. That is correct.

Q. Did either Mr. Doty or Mr. Avery suggest to you that if that was your state of mind, the way to find out was to proceed with a Labor Board election?

A. No.

Q. Did you suggest it to them?

A. No.

Q. So prior to the time that General Counsel's Exhibit No. 2 was circulated, there was no consideration given by you or Mr. Avery or Mr. Doty to possibly having a consent election by [179] secret ballot so the employees could vote?

A. I did not decide to do so.

Q. However, it is true, is it not, Mr. Handwerker, that after that document, General Counsel's Exhibit No. 2, was circulated and all those signatures were obtained, that then you called the National Labor Relations Board and said you would consent to an election; is that right?

(Testimony of Winston Handwerker.)

A. We consented. I am not sure whether it was by telephone or not.

Q. Whether it was by a telephone call or by a letter, or——

Trial Examiner: You communicated with them?

The Witness: Yes.

Q. (By Mr. Leonard): And you did so after General Counsel's Exhibit No. 2 had been circulated by your supervisory personnel and had been signed by your employees; is that correct?

A. That is correct. [180]

* * * * *

PAUL K. DOTY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Paul K. Doty.

Trial Examiner: And where do you live, sir?

The Witness: 1736 West Dayton Avenue, Fresno, California.

* * * * *

Q. (By Mr. Avery): What is your occupation, Mr. Doty? A. I am an attorney. [186]

Q. And how long have you been practicing as an attorney? A. Four years.

Q. Do you specialize in any particular branch of the law?

A. Yes. I specialize in labor laws.

Q. And in that specialization, Mr. Doty, have

(Testimony of Paul K. Doty.)

you been representing California Compress Co., Inc., for some years? A. I have.

Trial Examiner: How many years have you been practicing?

The Witness: Four.

Trial Examiner: Forty?

The Witness: Four, f-o-u-r.

Trial Examiner: Four?

The Witness: Yes.

Q. (By Mr. Avery): Mr. Doty, when did you first hear of the petition for representative allegation being filed with respect to production and maintenance employees of the California Compress Co., Inc.? A. On November 6th.

Q. And will you tell us the story from then on, what your connection with the affair was?

A. On November 6th I was at the National Labor Relations Board offices in connection with some other matters, and I was advised by Field Examiner Shirley Bingham that a petition had been filed by the ILWU in this matter.

I inquired whether or not they made a sufficient showing [187] of interest at that time, and she told me they had.

Upon my return to the hotel, I received word at my office that Mr. Handwerker was calling. I called Mr. Handwerker and notified him of the petition and also stated to him that there appeared to be a sufficient showing of interest.

His replies to me were in substance:

"I don't believe there could be any union mem-

(Testimony of Paul K. Doty.)

bers here or any applications signed, let alone a majority of our employees.”

I told him I had not discussed with the Board officials the authenticity of the cards or how current they were or anything along that line, but I would check with them the following Monday, I believe. I was remaining in San Francisco. I would check to see what the status was.

At that time I discussed with Albert Schneider—Miss Bingham was out of town—the cards. He stated they seemed to be current and that approximately 80 percent of the 86 employees—I advised him that there were 86 employees—that approximately 80 percent had signed authorization cards.

I asked him what the procedure was if these cards turned out to be not authentic. He said usually they would have the FBI check the signatures and compare those with signatures on cancelled pay checks.

I asked not to proceed further until I talked with the company, but perhaps that should be done, and then I returned to Fresno. [188]

The next conversation, I think, was—well, there may have been conversations between. I don't remember. I remember on the 29th Mr. Avery contacted me, Mr. Avery of the law firm of Avery, Meux and Gallagher, he being the company's general counsel, and we discussed the matter of these authorization cards.

We discussed particularly the Globe Iron case and decided to discuss with the company the pos-

(Testimony of Paul K. Doty.)

sibility of circularizing a petition and using the language of that particular case.

And the next thing I heard, this had been done. Shortly thereafter I was advised by Mr. Avery that we could consent to an election; that they felt they might as well proceed. I was in San Francisco the following day and discussed the matter with Mr. Yeates, and Mr. Yeates said it was too late; that they had already filed an unfair labor practice charge.

That is all.

Trial Examiner: Now, Mr. Yeates told you that an unfair labor practice charge was on file and they would not proceed with the election?

The Witness: That's correct.

Trial Examiner: He told you that was the Board's policy?

The Witness: That's right. [189]

* * * * *

Cross Examination

Q. (By Mr. Yeates): Mr. Doty, you are aware that a determination of the showing of interest on an election is an administrative matter; is that correct? [190] A. I am.

Q. And that the Board, in determining whether there is a timely showing, finds that out in their own process and then from that point determines whether to proceed with the election or hearing?

A. I would say in the absence of any forgeries or anything like that, that would be true.

Q. In your past practice with the Board, has it

(Testimony of Paul K. Doty.)

always been an administrative matter on the showing of interest, as far as you know?

Trial Examiner: Have you ever, in your experience prior to this time, called to the Board's attention that the authorization cards were forgeries or not authentic or not signed by the persons whose names appeared thereon?

The Witness: Never in my experience have I had any opportunity to doubt the cards.

Trial Examiner: Well, you say you have been practicing four years.

The Witness: I was an industrial labor consultant for fifteen or sixteen years prior to that.

* * * * *

Q. (By Mr. Leonard): Mr. Doty, with respect to General Counsel's [191] Exhibit No. 2, was that, to your knowledge, ever presented to the National Labor Relations Board?

A. Was this ever presented to the National Labor Relations Board?

Q. Yes.

Trial Examiner: Or a copy of it.

Q. (By Mr. Leonard): Or a copy of it.

A. Yes.

Q. Where? A. After the charges were filed.

Q. After the charges were filed? A. Yes.

Q. All right. Now, you stated that on or about the 10th of December you were in the Board's office and you saw Mr. Yeates, and he told you it was too late to go ahead with a consent election because the

(Testimony of Paul K. Doty.)

charges had been filed? Do you recall that testimony? A. Yes.

Q. It is also true, is it not, Mr. Doty, that sometime thereafter I called you on the telephone on behalf of the ILWU and offered to withdraw the charges if the company consented to an election; is that not correct?

A. Well, that is partially correct, I would say.

Q. Well, in what respect is it incorrect?

A. Well, we didn't feel we had a full complement of employees [192] at that time, and I didn't know the company's policy, but you did phone me to see if this matter could be settled.

Q. The fact is that sometime in December, before the first of the year of 1957, December of 1957, I called you and said the union would withdraw these charges if we could have a consent election, and you told me you would let me know; isn't that right?

A. I think that's right. I don't know the date.

Q. Well, that is true? A. Yes.

Q. And then you told me that that couldn't be done? A. That's right.

* * * * *

KENNETH G. AVERY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

(Testimony of Kenneth G. Avery.)

Direct Examination

Trial Examiner: What is your name?

The Witness: Kenneth G. Avery, 4064 Wishon,
Fresno, California. * * * * * [193]

Mr. Doty: I will ask a few questions of Mr.
Avery.

Trial Examiner: Very well, sir. [194]

* * * * *

Q. (By Mr. Doty): Mr. Avery, shortly after
the unfair labor practice charge was filed, was there
a meeting held in the offices of Doty, Evans and
Quinlan, with the Field Examiner Miss Shirley
Bingham?

A. Yes, after the charge had been filed. [203]

* * * * *

Q. (By Mr. Doty): Was the General Counsel's
Exhibit No. 2 a topic of discussion at this meeting?

A. Yes, General Counsel's Exhibit No. 2 was one
of the photostatic copies of the document which
had been circulated on December 4th and 5th, which
I had prepared for the purpose of delivering to
Miss Bingham at this meeting.

Q. What was stated in that document at that
time? [204]

* * * * *

A. Concerning that document, I told Miss Bing-
ham that we had circulated this document for the
purpose of producing evidence that the Board could
consider as to the sufficiency of representation;

(Testimony of Kenneth G. Avery.)

that I wished to file the original of this document in the representation proceedings, and asked her if she was willing to accept the photostatic copy for her purposes in connection with the unfair labor charge hearing.

At that meeting she said that probably the best procedure was to submit payroll checks which the Board could then check against the union authorization cards to determine the authenticity of the signatures. So following that meeting on December 17 I did forward to Miss Bingham payroll checks with 86 employees that had been issued on November 8 and requested her to check those—the endorsements on those payroll checks against the union signature cards.

Q. (By Mr. Doty): Was this done by letter?

A. That was done by letter.

Q. Did you receive a reply from this letter in regard to the payroll checks under examination?

A. Yes, I received a reply that they had been checked against the union authorization cards, and I subsequently received a reply from General Counsel, Mr. Robert Yeates, returning the payroll checks and apologizing for the delay in returning them.

* * * * *

Cross Examination * * * * *

Q. (By Mr. Yeates): Mr. Handwerker advised you that there was, in his opinion, not a showing of interest by the union, an authentic showing of interest by the union?

(Testimony of Kenneth G. Avery.)

A. That's correct, in substance.

Q. And in support of his feeling on this, what information did he give you?

A. Mr. Handwerker stated that he had received word through his superintendent that the employees had stated they were not interested in a union and were completely satisfied with their working conditions.

Q. Well, now, as best you can, tell me exactly what he told you. [211]

A. That, in substance, is what he told me.

Q. Did you meet with Mr. Young or any of the supervisors of the company prior to the preparation of General Counsel's No. 2? A. No.

Q. Did you meet or discuss with any of the employees themselves anything in connection with General Counsel's Exhibit No. 2 before its preparation? A. No.

Q. Had you been advised by Mr. Doty that the usual and ordinary procedure or, rather, that the showing of interest was an administrative matter determined by the Board?

A. Mr. Doty so advised me.

Q. And he advised you of that at what time in relation to the preparation of General Counsel's Exhibit No. 2?

A. He gave me that information on November 29 when we had a conference in his office.

Q. Did he advise you of what the effect would be of a consent election agreement between the employer and the petitioning union?

(Testimony of Kenneth G. Avery.)

A. No, I don't think the effect of a consent election was discussed.

Q. Was a consent election discussed?

A. A consent election was discussed and a decision made not to consent at that particular time.

Q. Was the decision not to proceed with [212] the election at that time—whose decision was that?

A. That decision was counsel's decision in conference with Mr. Handwerker.

Q. From the information you have previously stated that Mr. Handwerker gave you?

A. That's correct.

Mr. Yeates: That's all.

Mr. Leonard: Just one or two questions, please, Mr. Avery.

Q. (By Mr. Leonard): In other words, on November 29th, based upon the information from Mr. Handwerker that the showing was not authentic for the reasons already stated, the decision of the company was not to proceed with a consent election; is that correct?

A. That is correct, for the reason that if there was not a sufficient representation and that could be brought to the attention of the Board, then there was no use wasting the employees' time by an election that would serve no purpose.

Q. And then this document called General Counsel's Exhibit No. 2 was prepared by you and the man you indicated and was circulated and was returned to you when? Do you recall?

A. I believe it was first returned to me on the

(Testimony of Kenneth G. Avery.)

afternoon of December 5th. However, it was not notarized, and I was therefore unable to use the document with the notary's form that I had originally attached to it, so subsequently I prepared the [213] last page of Exhibit No. 2 and had it executed by Mr. Kuhns. I believe that was about the 10th of December.

Q. And were there some subsequent meetings, conferences, between you and Mr. Handwerker and Mr. Doty after the 10th of December in connection with this matter? A. Oh, yes.

Q. And there was a time, was there not, after the 10th of December when the company indicated to the Labor Board that it would agree to a consent election? A. Not after the 10th, no.

Q. Well, was it on the 10th?

A. I believe that was on the 5th.

Q. It was on the 5th? A. Yes.

Q. On the 5th of December the company——

A. It was either the 5th or the 6th, Counsel.

Q. All right. In any case, it was either the day you received, or the day after you received from Mr. Young General Counsel's Exhibit No. 2 with the signatures on it?

A. It could have been before I received it.

Q. But after you had been advised of its contents? A. That's correct.

Q. That the employees had signed it?

A. That's correct.

Q. So prior to the time the company was aware of the fact that [214] the employees, or a large

(Testimony of Kenneth G. Avery.)

part of them, had consented to an election, it was after all the signatures were obtained on the document that the company consented to an election?

A. That's right. You are correct as to the timing. We did consent to a consent election after this had been signed, yes.

Q. Now, did Mr. Doty advise you sometime within the next two weeks or so after December 5th that the union would withdraw its charges in this case if the company would proceed with a consent election? Did Mr. Doty ever so advise you?

A. Yes, I believe that was mentioned. It was not seriously considered, so I have no clear recollection of that.

Q. Do you remember about when it was mentioned?

A. No, I have no recollection of that.

Q. Well, was it sometime before Christmas of 1957? It was sometime before Christmas of 1957, wasn't it?

A. No. I have no clear recollection. I believe that that was mentioned to me, but I don't recall when.

Q. Could you help us out by telling us whether it was within a week or two weeks from the time the company indicated it would consent to a consent election?

A. No, I couldn't, because we were interested then of the charge that was made, the information we received shortly after we decided to consent, and I think almost immediately I was advised by

(Testimony of Kenneth G. Avery.)

Mr. Doty that the representation election had been called off, which was set for December 10th. [215]

Q. The hearing had been set for December 10th?

A. Yes. That was the deadline against which we were working, of course.

Q. Did you advise or instruct, whichever might be proper, Mr. Doty to make a response to the union's proposal that the charges be withdrawn and there be a consent election?

A. I at all times advised Mr. Doty that we are not prepared to consent to an election after the charges had been filed.

Q. After December 10th?

A. After the charges had been filed, and I believe we heard about it on December 6th or thereabouts.

Q. You couldn't have heard it on December 6th, Mr. Avery, because they weren't filed until the 10th of December, as the exhibit shows.

A. The charges?

Q. Yes.

A. Well, I may be mistaken, but if you will refer to the record, I will be glad to refresh my recollection of that.

Mr. Doty: The 9th.

Q. (By Mr. Leonard): They were filed on the 9th and apparently service was made on you by a letter dated December 9th in San Francisco, so I presume you received it in Fresno on December 10th, but the date is of no importance.

(Testimony of Kenneth G. Avery.)

Q. May I consult my files? I believe there is another document we haven't received. [216]

Mr. Leonard: I have no objection.

Trial Examiner: Where is the original of those exhibits?

Mr. Yeates: Right here.

The Witness: Yes, that is a copy of the document I do have. It seems to me, to the best of my recollection, that I heard by telephone from Mr. Doty about the filing of these in advance of our getting the actual charge.

Q. (By Mr. Leonard): Well, they were filed on the 10th, so you may have heard from him on the 9th or the 10th.

Trial Examiner: Well, let's go ahead.

Mr. Leonard: Yes, sir.

Q. (By Mr. Leonard): You say that after a conference with Miss Bingham sometime later on, she suggested to you that the best procedure for you to follow in connection with checking the authenticity of those union authorization cards was to submit some payroll cards and the signatures would be checked?

A. I am sorry, I couldn't hear you.

Trial Examiner: Will the reporter kindly read the question?

(Question read.)

A. Yes, the payroll checks, if that is what you have reference to.

Q. (By Mr. Leonard): Yes.

A. And that is after I had requested or had

(Testimony of Kenneth G. Avery.)

permission to file the original of General Counsel's Exhibit No. 2 in the representation matter. [217]

Q. And did you submit the payroll checks?

A. I did.

Q. And did you receive a report from the National Labor Relations Board on what they had done with the checks? A. Yes.

Q. What was that?

A. I understand they checked them.

Q. And what did they tell you?

A. I don't recall the contents of the letter.

Trial Examiner: Was it in writing?

The Witness: I received a letter from Mr. Gerald Brown in writing, yes.

Trial Examiner: Will you look at it, please?

The Witness: Surely.

Trial Examiner: Maybe it will refresh your recollection.

The Witness: Yes, I received a letter from Gerald A. Brown, dated December 30, 1957.

Mr. Leonard: May I see it, please?

The Witness: Yes.

Mr. Leonard: I would like to offer in evidence the letter to which the witness has just made reference.

Trial Examiner: Any objections, gentlemen?

Mr. Yeates: No objection.

Mr. Doty: No objection. [218]

Mr. Avery: No objection.

Trial Examiner: There being no objection, the papers will be received in evidence, and I will

(Testimony of Kenneth G. Avery.)

kindly ask the reporter to mark it as Union's Exhibit No. 1.

* * * *

Q. (By Mr. Leonard): I just want to be certain that the record is clear on one thing, Mr. Avery: Prior to the preparation of General Counsel's Exhibit No. 2, your factual inquiry—I am not talking about the legal inquiry, but your factual inquiry resulting in your obtaining information in writing relating, one, to the 1956 election involving the Chemical Workers and, two, in writing a list of the 86 employees who were on the payroll as of November 6th and, three, some conversations with Mr. Handwerker, that was the factual matter that you had; is that correct? [219] Is that all the factual matter you had?

Trial Examiner: No. He said and the papers.

Q. (By Mr. Leonard): And the papers in the representation case here?

A. That is correct.

Q. There wasn't anything else?

A. That is correct.

* * * * *

LAWRENCE YOUNG

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Larry Young. [220]

(Testimony of Lawrence Young.)

Trial Examiner: Is it Lawrence or Larry?

The Witness: Well, it's really Lawrence, but most people know me by the name of Larry.

Trial Examiner: But it is Lawrence?

The Witness: Yes, sir.

Trial Examiner: Where do you live, Mr. Young?

The Witness: 4353 North Harrison.

Trial Examiner: Fresno?

The Witness: Fresno.

* * * * *

Q. (By Mr. Avery): Mr. Young, are you connected with the California Compress Co., Inc., the Respondent in this matter? A. I am.

Q. And what position do you hold with that company? A. Superintendent.

Q. What are your duties?

A. Charge of maintenance and production.

Q. Do you have any supervisors working under you? A. Yes, I do.

Q. And who are those supervisors?

A. Don Robinson, Charlie Kuhns, Henry Hayes, Ray Stidman. [221]

* * * * *

Q. Now, was it brought to your attention, Mr. Young, that a petition had been filed by the International Longshoremen's and Warehousemen's Union, Independent, requesting a representative election? A. Yes.

Q. And how was that called to your attention?

A. Mr. Handwerker told me about it.

Q. Included in that petition, it was stated, was

(Testimony of Lawrence Young.)

it not, that the union purported to represent a substantial number of employees?

A. Yes. [222]

* * * * *

Q. (By Mr. Avery): Will you state the conversation between you and Mr. Handwerker concerning the filing of this representative petition?

Mr. Leonard: That is objected to on the grounds that it is immaterial and is self-serving. It would be——

Trial Examiner: Overruled.

Q. (By Mr. Avery): You may state it.

A. Mr. Handwerker asked me if I thought it was possible that many of our employees, or if any of our employees, had signed cards or had asked for representation, and I told him definitely I was positive myself that they hadn't. That was the information I gave him.

Trial Examiner: Had not?

The Witness: Had not.

Q. (By Mr. Avery): Following that first conversation, did Mr. Handwerker instruct you to take any action to verify your opinion? A. Yes.

Q. And what was that action?

A. He asked me if there was any way I could find out if it was true, and I told him there was. All I had to do was ask the boys.

Q. And did you ask the boys?

A. I asked three or four of the boys. [223]

* * * * *

(Testimony of Lawrence Young.)

Q. (By Mr. Avery): What did you report to Mr. Handwerker?

Mr. Leonard: We object to it on the grounds that it is immaterial and no proper foundation has been laid.

Trial Examiner: Overruled. Lay a foundation first, will you, Mr. Avery?

Q. (By Mr. Avery): Approximately what date did you report to Mr. Handwerker as a result of your investigation? [224]

A. The date I couldn't tell you.

Trial Examiner: About how long after your first conversation?

The Witness: The same day.

Q. (By Mr. Avery): Who was present besides yourself and Mr. Handwerker, if anyone?

A. No one.

Trial Examiner: When was the first conversation? Did you fix a date, Mr. Avery?

Mr. Avery: No, we didn't fix a date. It was sometime after the filing of the petition.

Trial Examiner: Well, how soon after that?

Q. (By Mr. Avery): Do you know approximately when Mr. Handwerker advised you of the filing of the representation petition?

A. As far as I remember, it was the same day we got it.

Q. Do you recall now approximately the date you got it?

A. No, I wouldn't even try.

Q. All right. Now, referring to your conversation with Mr. Handwerker, after you made your

(Testimony of Lawrence Young.)

investigation you talked to some of the men, and you say you and Mr. Handwerker were present. Where was it? Was it in your office or in his office?

A. His office.

Q. His office? A. Yes.

Q. And you say no one else was present? [225]

A. No.

Q. What was told to Mr. Handwerker?

Mr. Leonard: I object to that. He is about to express an opinion he derived from other people and that is the foundation I think we are entitled to.

Trial Examiner: I will overrule the objection. You will have an opportunity to bring it out if you want to do it.

Mr. Leonard: All right.

Q. (By Mr. Avery): What did you tell Mr. Handwerker?

A. I was still convinced that there was no truth in the fact that the boys signed for representation.

Trial Examiner: Did you tell him the source of your information?

The Witness: Yes.

Trial Examiner: Did you tell him to whom you spoke?

The Witness: Yes.

Trial Examiner: Tell us all about the conversation.

The Witness: Well, I talked to——

Trial Examiner: Tell us what you said to Mr. Handwerker at that time.

(Testimony of Lawrence Young.)

The Witness: Well, I told him that I asked some of the boys about it, what I considered to be a rumor, and they told me that no one had signed or was interested in a union.

Trial Examiner: All right.

Q. (By Mr. Avery): Now, following that [226] conversation, which was shortly after you had first been informed of a representation, that a petition had been filed, did you have any further conversation with Mr. Handwerker in which he instructed you to do anything with regard to finding out whether your employees had authorized the union to file this petition?

A. No. I had already done that.

Q. All right. Now, referring to approximately December 4, 1957, did you have a conversation with Mr. Handwerker in which he gave you some instructions? A. Yes.

Q. All right. State the nature of that conversation and in general the instructions you received.

* * * * *

The Witness: He gave me the document.

Q. (By Mr. Avery): You are referring to General Counsel's Exhibit No. 2? [227]

A. Yes, that's it.

Q. All right.

A. He explained to me its contents, and he asked me if I would call my foremen in and explain it to them and have them circulate it among the men and explain to the men what it meant and

(Testimony of Lawrence Young.)

let them read it and find out who had, if they had, signed cards asking for representation.

Q. Following that conversation with Mr. Handwerker and on the same date, did you have a meeting with your supervisors? A. I did.

Q. And which supervisors?

A. Don Robinson, Charlie Kuhns, Henry Hayes.

Q. And where did that meeting take place?

A. In my office.

Q. And what did you state to your supervisors on that occasion?

Mr. Leonard: That is objected to on the grounds that it is incompetent, irrelevant and immaterial and self-serving.

Trial Examiner: Overruled.

A. I explained the document to them.

Trial Examiner: Tell us what you said. That is a conclusion. Tell us as nearly as you can what you said to these foremen.

The Witness: I told them that they were to get the information [228] or circulate this document; that we are not interested at all in the employees' union activities; all we wanted to know was if they had signed cards asking for representation and to make it very clear that it would have nothing to do with their job as far as our plant was concerned, or with any affiliations they had with any organization.

Q. (By Mr. Avery): Did you hand the original, of which Exhibit No. 2 is a photostatic copy, to one of your foremen? A. I did.

(Testimony of Lawrence Young.)

Q. And to whom?

A. Mr. Charlie Kuhns.

Mr. Leonard: Mr. Examiner, without repeating it all the time, I take it I may have a continuing objection to this on the ground that it is self-serving.

Trial Examiner: Overruled.

Q. (By Mr. Avery): And did you instruct Mr. Kuhns what to do with that document?

A. I did.

Q. And what were your instructions specifically to Mr. Kuhns in addition to what you have already said?

A. Nothing in addition to what I have already said to Mr. Kuhns, except I wanted each foreman to talk to his own men and explain it to them. [229]

* * * * *

Q. (By Mr. Avery): Were all of your 86 employees who were in production and maintenance work able to read and write?

A. That I can't answer for you. I don't know.

Q. Now, did you at any time during the circulation of this petition talk to any of the 86 employees?

A. Yes, I did.

Q. And on what occasion?

A. It was on the morning of December 5th.

Q. At approximately what time?

A. Approximately nine o'clock.

Q. And where?

A. In Mr. Robinson's office.

Q. Who was present at that time?

(Testimony of Lawrence Young.)

A. Don Robinson, Charlie Kuhns, Harold Judson, Willie DeBise.

Q. What was your occasion in going to Mr. Robinson's office at that time?

A. To pick up shipping orders.

Q. Now, was anything said to you or either Mr. DeBise or Mr. Judson when you entered the room?

A. Yes. [231]

Q. What was said?

A. Mr. DeBise asked me outright if there was any truth in the rumor that if they did not sign the petition that was on the plant they would lose their jobs.

Q. And what did you reply?

A. Definitely not. There was no truth in it. It had nothing to do with their jobs at all. It would affect them in no way as far as I knew with their standing with the union. [232]

* * * * *

Q. Now, a statement has been made, Mr. Young, that sometime in November, date unknown, you addressed a gathering of the employees in the smoke room or boiler room. Do you recall any such occasion? A. Yes, I do.

Q. Approximately when was that?

A. I couldn't possibly give you a date on it.

Trial Examiner: Well, could you tell us what month it was?

The Witness: I can tell you that it was after we had been notified that the boys had asked for representation by the union.

(Testimony of Lawrence Young.)

Trial Examiner: Well, how long after?

The Witness: Oh, three or four days. [233]

* * * * *

Cross-Examination

Q. (By Mr. Leonard): Mr. Young, I just want to fix some time sequences if I can.

As I understand it, the very first information that you had about this matter was that Mr. Handwerker informed you that a petition for representation had been filed; is that right?

A. That's right.

Q. And you can't fix the date of that, but you think it was shortly after the petition was received by the company, within a day or so, that Mr. Handwerker talked to you?

Trial Examiner: He said he thought it was the same day.

A. Yes. [235]

Q. (By Mr. Leonard): Now, was it on the same day that Mr. Handwerker first talked to you that you had this discussion in the smoke house about which you have given testimony?

A. No.

Trial Examiner: He said about three or four days later.

Mr. Leonard: Well, maybe my notes are inaccurate.

Q. (By Mr. Leonard): It was three or four days later? A. Approximately.

Trial Examiner: How long was that talk of

(Testimony of Lawrence Young.)

yours in the smoke house? How long did that take?

The Witness: It was very brief.

Trial Examiner: About how long?

The Witness: Probably two or three minutes.

Q. (By Mr. Leonard): As I recollect it, you said none of the men said anything? A. No.

Q. The men just remained silent?

A. That's right.

Q. You told the men what you had to say and the men remained silent and then you left?

A. That's right.

Q. And then you reported back to Mr. Handwerker and at some later date——

A. I didn't report to Mr. Handwerker at that time.

Q. You didn't tell him about the meeting in the smoke house? [236]

A. There was nothing to tell him.

Q. You didn't tell him anything about it?

A. No.

* * * * *

CHARLES H. KUHNS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Charles H. Kuhns.

Trial Examiner: And where do you live, Mr. Kuhns?

(Testimony of Charles H. Kuhns.)

The Witness: 412 San Jose, Clovis.

Trial Examiner: Is that in Fresno?

The Witness: Well it's about six miles from here.

* * * * *

Q. (By Mr. Avery): Mr. Kuhns, are you [237] connected with California Compress Co., Inc., the Respondent in this matter? A. Yes, sir.

Q. What is your position with that company?

A. I am a foreman of the receiving crew. [238]

* * * * *

Q. Mr. Kuhns, referring to December 4, 1957, on that date were you in a meeting with Mr. Lawrence Young, your superintendent, Mr. Henry Hayes and Mr. Donald Robinson?

A. Yes, sir.

Q. What was said at that meeting?

* * * * *

A. Mr. Young called us into his office and told us that he had [239] an affidavit to sign, for the men to sign if they had not signed union cards or did not know what they were signing at the time, and he read the——

Q. (By Mr. Avery): You are referring to General Counsel's Exhibit No. 2?

A. Well, I believe so.

Trial Examiner: Well, that is what it is.

Q. (By Mr. Avery): Well, let me show you the original of this document.

Trial Examiner: Is this what you are referring to?

(Testimony of Charles H. Kuhns.)

The Witness: Yes, sir, that's it.

Trial Examiner: All right. Go ahead, Mr. Avery.

Q. (By Mr. Avery): I will show you the original of Exhibit No. 2 and ask you if that was the document that he had with him, without the signatures on it. A. Yes, sir.

Q. Yes. Did you also read it?

A. Yes, sir, I read it.

Q. Now, what particular instructions did he give you? In other words, what was your part to play?

A. I was to circulate this document among the receiving crew and also go with Mr. Hayes and Mr. Robinson to their crews, and I was supposed to witness the signatures on this document. I was to make sure that the right men were signing. [240]

* * * * *

Q. (By Mr. Avery): Now, tell me what you did with the original of General Counsel's Exhibit No. 2 and Respondent's Exhibit No. 2.

A. I took these papers down to the plant and first went to my own crew, my receiving crew, and I didn't call a special meeting. I went out to where they were working. So therefore I didn't get them in any special order, and I can't remember where I went first or anything like that, but I took this to my men and read it to them, and if they could read or if they wanted to read it, I would let them read it. And I asked them if they would sign it, and all but Mr. Richardson and Mr. Merritts signed it.

I also told them that it would have no bearing

(Testimony of Charles H. Kuhns.)

whatsoever on their job. Mr. Richardson and Mr. Merritts didn't sign. I had them both together at all times. Mr. Richardson and Mr. Merritts did not even look at the document. [242]

They said they signed a card and they didn't wish to sign it, and that's all there was to that.

And then I went to Mr. Hayes, and he also wasn't at any one spot. We covered all areas of the compress ground, meeting his men, and he explained it to them, or let them read it, and they signed it.

Q. Was there any member of Mr. Hayes' crew that did not sign it?

A. No. All of Mr. Hayes' crew signed this document with their signature, except Spencer Carter who put his "X" there and that "X" was witnessed.

Do you want times on this, too?

Q. Well——

A. This all started at one o'clock.

Q. On December 4th?

A. On December 4th.

Q. Yes.

A. And my crew and Mr. Hayes' crew was completed at 3:00 o'clock. At 3:00 o'clock I took this document into Mr. Robinson's office, where he called the men in and explained it to the men when he wasn't busy, and the men that were in there when he was busy, why, I would explain it to them or let them read it or read it to them.

Trial Examiner: Did you call them in at one time?

The Witness: No. [243]

(Testimony of Charles H. Kuhns.)

Trial Examiner: Was it a whole group?

The Witness: No. He has a certain number of relief men and they would relieve so three or four men could come in at a time, so we didn't have to shut the press down. He explained it to them or let them read it and asked them if they had not signed it, if they would sign this document.

Q. (By Mr. Avery): Now, did you complete obtaining all the signatures of Mr. Robinson's crew on December 4th?

A. No, sir. At 5:00 o'clock at night—wait a minute. I didn't complete Mr. Hayes' crew at the time I said. I just want to make it right. There was some of Mr. Hayes' men that were spotting cotton at the time, and they came in about 5:00 o'clock that night, as I remember it.

Q. All right.

A. And I imagine it was somewheres between 10 and 20 men in Mr. Robinson's crew that we hadn't talked to. There was also one on the night crew at the time, Mr. Ambers, I believe, that signed it when he came to work at around 5:30.

Q. In other words, you got all of Mr. Hayes' crew and all of your crew that were available by 3:00 o'clock? A. Yes, sir.

Q. And those that were not available, you picked up later during the day, either before or after 5:00 o'clock? A. Yes, sir.

Q. You say you did not complete all of Mr. Robinson's crew by 5:00 o'clock? [244]

A. No, sir. I took this paper back up to Mr.

(Testimony of Charles H. Kuhns.)

Young's office and left it there overnight. I believe they locked it in the safe, and I picked it up the following morning and took it back to Mr. Robinson's office and at that time we completed it, the ones that wanted to sign.

Q. When did you start obtaining signatures on the morning of the 5th?

A. I imagine it was about 8:15 or 8:20 after I had organized my crew, lined out the work for them.

* * * * *

Q. The last signature you had obtained before 10:00 o'clock; is that correct? A. Yes, sir.

Q. And then what did you do with the document with the signatures on it?

A. I went to town and I had it notarized that I had witnessed all the signatures and then I brought it up to your office, [245] Mr. Avery's office, and gave it to him.

Q. Now I will show you a sheet of paper, Mr. Kuhns, and ask you if this is your signature on it and if that is the notarization that you obtained on the 5th. A. Yes, sir.

Q. Now, subsequently I had you come to the office and sign a different type of affidavit to attach to the document; is that correct?

A. Yes, sir. [246]

* * * * *

Q. (By Mr. Avery): Now, referring to the morning of December 5th when you were completing the signatures on General Counsel's Exhibit

(Testimony of Charles H. Kuhns.)

No. 2 of the remaining members of Mr. Robinson's crew, were you in the office at a time when Mr. Willie DeBise, Mr. Harold Judson, Mr. Robinson and Mr. Larry Young were present?

A. Yes, sir.

Q. At that time did you hear any conversation between Mr. Willie DeBise and Mr. Lawrence Young?

A. No, sir. I heard them talking, but I wasn't listening.

Q. You didn't hear the substance of it?

A. No, sir, I don't believe. I can't remember.

Q. Well, at this time you can't remember the substance of what was said? A. No. [247]

* * * * *

Cross Examination

Q. (By Mr. Yeates): Mr. Kuhns, at the time you approached the employees with General Counsel's Exhibit No. 2, did you explain to them the purpose of that document, what you intended to do with it, or what the company intended to do with it? A. No, sir.

Q. And, as I understand your testimony, you told them that it was your understanding or Mr. Young's understanding or the company's understanding that the men had not signed union cards?

A. Yes, sir.

Q. And that was the purpose of the document?

A. Yes, sir.

Q. But you did not tell them what would be done ultimately with the petition?

(Testimony of Charles H. Kuhns.)

A. I had no knowledge of what would be done with the document.

Q. Was there ever any posting by the company, and I am referring particularly to after the discussion by Mr. DeBise and Mr. Judson in the office of Mr. Young wherein they asked if they would be fired if they didn't sign the petition,— [252]

* * * * *

A. Will you repeat that, please?

Trial Examiner: Will the reporter kindly read the question?

(Question read.)

Q. (By Mr. Yeates): Did the company post any written notification to the employees referring to the matter Mr. Young had told Mr. DeBise and Mr. Judson? A. No, sir.

* * * * *

Q. (By Mr. Leonard): Mr. Kuhns, as I understand it, this [253] petition, General Counsel's Exhibit No. 2, was given to you on the morning of December 4th by Mr. Young; is that correct?

A. Between 12:30 and 1:00 o'clock, I believe.

Q. And you were told that you were to be present when all the employees signed because they wanted to have somebody to be a witness?

A. That's right.

Q. That was your function, among others, to be a witness? A. That's right.

Q. And you took it to your own crew first?

A. Yes, sir.

Q. Did Mr. Young tell you why he wanted Rob-

(Testimony of Charles H. Kuhns.)

inson and Hayes to be present when you were taking it to their crews?

A. They were presented—they were to present it to their own crew.

Q. In other words, each foreman or supervisor was to present it to his own crew?

A. That's right.

Q. In other words, that man's immediate supervisor was to be there when it was presented to him; is that right?

A. That's right.

Q. Mr. Merritts is a member of your crew; is that right?

A. Yes, sir.

Q. And you first spoke to him about what time on the 4th of December, approximately? [254]

A. Around 1:30.

Q. And he indicated to you that because he had signed a union authorization card, he did not choose to sign this document?

A. That's right.

Q. And then you went on about the business of getting other signatures and taking it to Hayes' and Robinson's crews; is that right?

A. Yes.

Q. Why did you go back to Mr. Merritts?

A. I just happened to see him when I was coming out of the office.

Q. You wanted him to sign the document?

A. No. This was done in a hurry. I didn't stop any one man too long and when he said he signed it, I just wanted to make sure.

Q. But Merritts told you he already signed a union card and didn't want to sign this document?

A. I believe so.

(Testimony of Charles H. Kuhns.)

Q. But nonetheless, about 5:00 o'clock that afternoon you asked him questions as to whether or not he wanted to sign this document?

A. That's right. [255]

* * * * *

Q. Now, sometime between the 6th of November and the 10th of November you called the men together in your office? A. That's right.

Q. Is that correct, sir? A. That's right.

Q. Preceding that, that is, just before that, did you have any meeting or conference with Mr. Young? A. Yes, sir.

Q. How long before the time you called the men together? A. About two hours.

Q. And who was present besides you and Mr. Young?

A. I believe Mr. Hayes was there and Mr. Robinson.

Q. And, without going into what you discussed, is it fair to say that you discussed the problem of the representation petition and the questions connected with the representation? A. No. [256]

* * * * *

Trial Examiner: Tell us what it was.

The Witness: It had something to do with the rumor that 80 percent of the men signed. At that time I didn't know we received a petition. It was just the fact that a rumor was going around.

Q. (By Mr. Leonard): Did Mr. Young ask or suggest or direct the three foremen to find out what the fact was? A. He told us to listen.

(Testimony of Charles H. Kuhns.)

Q. To listen?

A. To try—— Strike that out. He asked us to try to find out if there was any basis for the rumor.

Q. I see.

Trial Examiner: Did he tell you how to find out?

The Witness: No, sir. He left that up to our discretion, I believe.

Q. (By Mr. Leonard): And was it following that suggestion of Mr. Young's that you called your crew together? A. Yes, sir. [257]

* * * * *

Q. Did you report back to Mr. Young——

A. Yes, sir.

Q. (Continuing): ——the results of the meeting you had with your crew?

A. Yes, sir.

Q. You did? A. Yes, sir.

Trial Examiner: When did you do that?

The Witness: The same night, I believe. Well, I wouldn't want to put any time down because I saw him a lot of times a day.

Trial Examiner: What did you tell him?

The Witness: I told him that all of my men seemed to be contented, and they didn't want a union. They said they didn't want any, and they all seemed to be happy.

Q. (By Mr. Leonard): They just didn't respond to you one way or another when you asked them if they signed up? They didn't say they did or didn't?

(Testimony of Charles H. Kuhns.)

A. Some of them said they did not.

Q. Some of them said they did not?

A. That's right.

Q. And some of them said nothing? [258]

A. That's right. [259]

* * * * *

HENRY HAYES

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Henry Hayes.

Trial Examiner: Will you kindly spell your last name?

The Witness: H-a-y-e-s.

Trial Examiner: Where do you live?

The Witness: 14 Myers, Fresno.

* * * * *

Q. (By Mr. Avery): Mr. Hayes, are you employed by California Compress Co., Inc., the Respondent in this matter? A. I am.

Q. And what is your position with that company? A. Yard foreman. [260]

* * * * *

Q. Now, Mr. Hayes, referring to December 4, 1957, did you attend a meeting at which Mr. Lawrence Young, Mr. Donald Robinson and Mr. Charlie Kuhns were present? A. I did.

Q. And what was said at that time? [261]

* * * * *

(Testimony of Henry Hayes.)

A. Well, I was called in to Mr. Young's office to sign a petition. We heard rumors that some of the fellows signed union cards, and we wanted to find out if it was true or false.

Q. (By Mr. Avery): Now, did you receive any instructions from Mr. Young as to what he wanted you to do with the General Counsel's Exhibit No. 2, which is the document in front of you?

A. Well, I was to take it to my men after Mr. Kuhns got through with his men, and Mr. Kuhns was supposed to go with me, which he did, and I read it off to my men and explained what it was.

Q. How did you approach the men in your group? Did you do that individually or in groups?

A. Individually, because I had to go all over the yard to get them.

Q. Now, did you either read the document or let the men read the document?

A. I read it to them and explained it to them and told them if anybody wanted to read it, why, they could.

Q. What explanation did you give to your men?

A. Well, I told the men that this petition was to find out if they signed a union card or not, and if they signed a union [262] card or had not signed a union card, I would still like them to sign this document. [263]

(Testimony of Henry Hayes.)

Cross-Examination * * * * *

Q. (By Mr. Leonard): Mr. Hayes, sometime between the 6th and 10th of November, right after this petition for representation was filed by the union, didn't you attend a meeting in Mr. Young's office at which were present yourself, Mr. Young, Mr. Robinson and Mr. Kuhns? A. I did.

Q. And was there some discussion in that meeting about some rumors that had been going around that the men had signed up for the union? [268]

A. Yes.

Q. Were you given any instructions by Mr. Young in connection with that matter?

A. No, not specific.

Q. Well, whether they were specific or not?

A. He just asked me to go around to my men and try to find out if anyone signed a union card or not or whether anyone was interested in a union.

Q. And did you do anything about that?

A. Well, I spoke to some of the men, and the answer I got was no.

Q. You did speak to the men about it?

A. Yes. I asked them if they were happy.

Q. The way you put it was that you asked them if they were happy working out there?

A. That's right.

Q. Did you ask them if they signed a union card or not?

A. No, sir, I didn't ask them if they signed a union card. * * * * * [269]

BONNIE MERRITTS

a rebuttal witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows: [283]

Direct Examination

Q. (By Mr. Yeates): Mr. Merritts, you are the gentleman who was previously sworn at this hearing? A. Yes, sir.

Q. And you testified before; is that correct?

A. That's right.

Q. Now, you were present in the hearing room when Mr. Kuhns gave his account of the conversation between Mr. Kuhns and yourself following your discussion in regards to the petition where he states that he told you that because of your age, he thought the union was a good thing for you; did you hear that testimony by Mr. Kuhns?

A. He told me that.

Q. Well, first, Mr. Merritts, did you hear his conversation when he testified, when he said that?

A. Oh, yes.

* * * * *

Q. (By Mr. Yeates): Will you state now what conversation was had between yourself and Mr. Kuhns at that time?

A. Yes. I met Mr. Kuhns just as he was coming out of the [284] office door, and he said to me, he said, "If I were you, at your age, I would go down and have my name taken off and tell them you didn't know what you were signing."

I said in reply that I did know what I was

(Testimony of Bonnie Merritts.)

signing and it didn't make any difference to me. That's all.

Q. Now, prior to that statement to you had he asked you whether you were interested in changing your mind or getting your name removed from the union card?

A. That was the only time.

Q. Well, I mean during that conversation?

A. No, he didn't say any more about it.

Q. All right. Now, in your mind, Mr. Merritts, did you feel that that is the statement he made?

A. That is the statement he made in the conversation between he and I.

Q. Is there any possibility that you misunderstood the statement, as far as you know?

A. No, I didn't misunderstand it because he was talking directly to me. [285]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 2

State of California

County of Fresno—ss.

The undersigned, each for himself, after first being sworn, deposes and says:

That he was on the 6th day of November, 1957, and is now, employed by California Compress Co., Inc., a corporation, at its cotton compressing plant at Nielsen Avenue and Marks Street, Fresno, California, and in such employment performs production and maintenance work; that he has not affixed his signature to any card or paper intending

General Counsel's Exhibit No. 2—(Continued)
thereby, or being advised that such signature
would be used, to support a claim of representa-
tion by International Longshoremen's & Ware-
housemen's Union, Independent, and that he has
not knowingly signed any such document.

* * * * *

State of California
County of Fresno—ss.

The undersigned, C. H. Kuhns, after first being
sworn, deposes and says:

That he knows each and all of the eighty-two
employees of California Compress Co., Inc., who
affixed their signatures to the attached document;
that each of said eighty-two employees signed their
name to the attached document in his presence,
with the exception of the employee by the name
of Spencer Carter; that Spencer Carter cannot
write; that Spencer Carter in my presence marked
an "x" on the line for his signature and that
Spencer Carter's foreman, Mr. Henry Hayes, at
Spencer Carter's request and in his presence signed
the name "Spencer Carter" immediately following
said "x," in my presence.

/s/ C. H. KUHNS.
C. H. Kuhns.

Subscribed and sworn to before me this 10th day
of December, 1957.

/s/ KENNETH G. AVERY,
Notary Public in and for
Said County and State.

INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSEMEN'S
UNION

APPLICATION

Date 8-12 1957

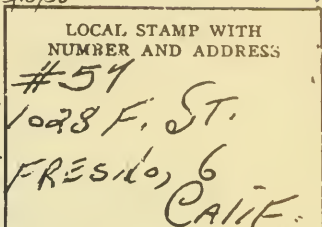
I Abraham Canty
do hereby make application

to the International Longshoremen's & Warehousemen's Union for membership, and authorize the Union, or any of its locals or representatives designated by it to engage in collective bargaining on my behalf. I promise to observe the Constitution and By-Laws and all decisions and actions thereunder.

I am employed by Calif. Compress Type of work Light

My address is 226 W. Chandler St
(Street and Number) (City) (Zone) (State)

My age is 45
Abraham Canty county
(See other side) (Signature) 100



INTERNATIONAL
LONGSHOREMEN'S & WAREHOUSEMEN'S
UNION

APPLICATION

Date 10-22-1957

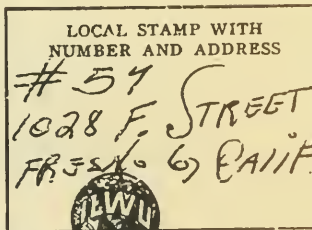
I Willis Ross
do hereby make application

to the International Longshoremen's & Warehousemen's Union for membership, and authorize the Union, or any of its locals or representatives designated by it to engage in collective bargaining on my behalf. I promise to observe the Constitution and By-Laws and all decisions and actions thereunder.

I am employed by Calif. Compress Type of work Labor

My address is 1816 5th St Fresno Calif
(Street and Number) (City) (Zone) (State)

My age is 32
Willis Ross
(See other side) (Signature) 100



GENERAL COUNSEL'S EXHIBIT No. 7-C

National Labor Relations Board

NOTICE

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour and place indicated. Postponements will not be granted unless good and sufficient grounds are shown and the following requirements are met:

- (1) The request must be in writing;
- (2) Grounds therefor must be set forth in detail;
- (3) Alternative dates for any rescheduled hearing must be given; and
- (4) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during

General Counsel's Exhibit No. 7-C—(Continued)
the three days immediately preceding the date of
hearing.

California Compress Co.
Neilson and Marks Streets
(P. O. Box 189)
Fresno, California

International Longshoremen's and
Warehousemen's Union, Independent
240 Montgomery Street
San Francisco 4, California
Attn: Norman Leonard, Esq.
(in duplicate)

Courtesy copy to:

Paul K. Doty, Esq.,
Doty, Evans & Quinlan
Attorneys at Law
Suite 415, T. W. Patterson Bldg.
Fresno 21, California

RESPONDENT'S EXHIBIT No. 1

AFFIDAVIT OF KENNETH G. AVERY

State of California
County of Fresno—ss.

Kenneth G. Avery, being first duly sworn, deposes and says:

That I am an attorney at law and a member of the law firm of Avery, Meux & Gallagher, and am

Respondent's Exhibit No. 1—(Continued)
retained as general counsel by California Compress Co., Inc., a California corporation.

That on or about the 27th day of November, 1957, I was telephonically advised by Mr. Winston P. Handwerker, General Manager of California Compress Co., Inc., that a petition had been filed with the National Labor Relations Board by the International Longshoremen's & Warehousemen's Union, Independent, for the purpose of conducting a representation election, and that in said petition it was alleged by the union that a substantial number of employees of California Compress Co., Inc. wished to be represented for purposes of collective bargaining by said union. Mr. Handwerker advised me that the National Labor Relations Board claimed to have on file authorization cards signed by approximately 80% of the 86 production and maintenance employees to the effect they wished to be represented by said union and that the National Labor Relations Board appeared to be satisfied that a sufficient showing of interest had been made to justify a hearing on December 10, 1957, upon the question of whether an election should be held even though Mr. Paul K. Doty, as special attorney for California Compress Co., Inc., had advised the National Labor Relations Board that California Compress Co., Inc. did not believe it was possible that any substantial number of employees had knowingly signed such cards. Mr. Handwerker stated that he sincerely believed that there was no substantial number of employees who wished to be

Respondent's Exhibit No. 1—(Continued)
represented by said union and that many employees had stated that they knew of no employees who wished to be represented by said union. Mr. Handwerker instructed me to discuss with Mr. Doty what steps could be taken to induce the National Labor Relations Board to check the authenticity of the cards which had been filed by them with the union and to determine whether as a matter of fact there had been a sufficient showing of interest to justify an election.

That on November 29, 1957, I had a meeting with Mr. Paul K. Doty of the law firm of Doty, Evans & Quinlan, and among other cases we reviewed the case of Globe Iron Foundry, 112 N.L.R.B. 145, which indicated that a proper procedure for bringing to the attention of National Labor Relations Board the question of the authenticity of authorization cards and to secure a re-determination of whether there was a sufficient showing of interest was to obtain the signatures of a sufficient number of employees to a statement that they had not affixed their signatures to any card or paper intending thereby, or being advised that such signatures would be used to support a claim of representation by the petitioning union and that they had not knowingly signed such document.

That pursuant to the authority of this case I prepared a form of affidavit using substantially the same language as used in the document referred to in the Globe Iron Foundry case and delivered

Respondent's Exhibit No. 1—(Continued)
said form of affidavit to Mr. Winston P. Handwerker for presentation to his employees. I advised Mr. Handwerker that his employees should be requested to sign such affidavit if the facts therein stated were true and correct as to each employee but that, in requesting such employees to sign the document, he should be careful that no language be used which could in any way be construed to be a threat of reprisal, or force, or promise of benefit, and that it should be made clear to his employees that their employment would be in no way affected regardless of whether or not they signed such document.

/s/ KENNETH G. AVERY.

Subscribed and sworn to before me this 17th day of December, 1958.

[Seal] /s/ ILMA H. PERRIN,
Notary Public in and for Said
County and State.

[Stamped]: Received December 18, 1957, National Labor Relations Board.

UNION'S EXHIBIT No. 1

National Labor Relations Board

Twentieth Region

630 Sansome St., San Francisco 11, California

Telephone Yukon 6-3111

Kenneth G. Avery, Esq.
605 Security Bank Building
Fresno 21, California

December 30, 1957

Re: California Compress Company—Case No. 20-
RC-3427

Dear Mr. Avery:

We have considered the allegations which you have made and the evidence which you have submitted relating to the validity of the showing made by the petitioner in the above-entitled case. From a consideration of such evidence, as well as from our own independent investigation, we are satisfied that there is no reasonable basis to find that the showing is not valid and, therefore, we conclude that the Union has made a valid showing sufficient to support its petition.

Although the charge against your client, filed in Case No. 20-CA-1366, is a separate proceeding, it is not wholly unrelated in some of its aspects. Our investigation of the charge case is not yet complete, but I feel that I should advise you that information presently at hand indicates the possibility that your instructions regarding the circulation of the petition in the instant case were not closely followed. We have some evidence which would indi-

Union's Exhibit No. 1—(Continued)

cate that supervisory personnel made coercive and unlawful statements to employees during the course of circulating the petitions.

The charge has been assigned to Mr. Robert Yeates, attorney in this office, and he will communicate with you directly regarding it in the near future.

Very truly yours,

/s/ GERALD A. BROWN,
Regional Director.

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 20th Region in the matter of: Case No. 20-CA-1366—California Compress Company, Inc., and International Longshoremen's and Warehousemen's Union, Fresno, California, March 18-19, 1958, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

FRANK J. McCABE,
Official Reporters,
/s/ By ERNEST CAPEFERN,
Field Reporter.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CALIFORNIA COMPRESS COMPANY, INC., RESPONDENT

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

STUART ROTHMAN,
General Counsel,

THOMAS J. McDERMOTT,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FREDERICK U. REEL,
DONALD J. BARDELL,
Attorneys,
National Labor Relations Board.

FILED

406 10 1959



INDEX

	Page
Jurisdiction	(1)
Statement of the case.....	2
I. The Board's finding of fact.....	2
A. The Union files a petition for representation and respondent expresses doubt as to the extent of the Union's support.....	2
B. Respondent interrogates the employees as to their union activity.....	4
C. Respondent obtains employee signatures on an antiunion affidavit	5
II. The Board's conclusions and order.....	8
Argument	8
The Board properly found that respondent unlawfully interrogated and polled its employees as to their union membership, thereby violating Section 8 (a) (1) of the Act.....	8
Conclusion	12
Appendix	13

AUTHORITIES CITED

Cases:

<i>N.L.R.B. v. Birmingham Pub. Co.</i> , 262 F. 2d 2 (C.A. 5)	10
<i>N.L.R.B. v. J. I. Case Co.</i> , 201 F. 2d 597 (C.A. 9)	11
<i>N.L.R.B. v. Katz Drug Co.</i> , 207 F. 2d 168 (C.A. 8)	10
<i>N.L.R.B. v. Parma Water Lifter Co.</i> , 211 F. 2d 258 (C.A. 9), certiorari denied, 348 U.S. 829..	10
<i>N.L.R.B. v. Protein Blenders, Inc.</i> , 215 F. 2d 749 (C.A. 8)	9
<i>N.L.R.B. v. Roberts Brothers</i> , 225 F. 2d 58 (C.A. 9)	9
<i>N.L.R.B. v. State Center Warehouse</i> , 193 F. 2d 156 (C.A. 9)	9

II

Cases—Continued	Page
<i>N.L.R.B. v. Sunshine Mining Co.</i> , 110 F. 2d 780 (C.A. 9), certiorari denied, 312 U.S. 678.....	10
<i>N.L.R.B. v. West Coast Casket Co.</i> , 205 F. 2d 902 (C.A. 9)	9
<i>N.L.R.B. v. Williams Lumber Co.</i> , 195 F. 2d 669 (C.A. 4), certiorari denied, 344 U.S. 834.....	11
<i>Pratto d/b/a Globe Iron Foundry</i> , 112 NLRB 1200	10

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, <i>et seq.</i>)	1, 13
Section 7	1
Section 8 (a) (1).....	2, 8
Section 8 (c)	11
Section 10 (c)	1
Section 10 (e)	2

In the United States Court of Appeals
for the Ninth Circuit

No. 16422

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CALIFORNIA COMPRESS COMPANY, INC., RESPONDENT

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against the respondent on October 16, 1958, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*) The Board's decision and order (R. 32-36)¹ are re-

¹ References designated "R" are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant portions of the Act appear in the Appendix, *infra*, p. 13.

ported at 121 NLRB No. 178. This Court has jurisdiction pursuant to Section 10 (e) of the Act, the unfair labor practices having occurred in Fresno, California, where respondent, a California corporation, is engaged in the storage, handling, and processing of cotton for shipment in interstate commerce (R. 13-14; 4, 7, 9).

STATEMENT OF THE CASE

I. THE BOARD'S FINDING OF FACT

Briefly, the Board found, that respondent's conduct in interrogating and polling its employees as to their union membership constituted interference, restraint and coercion violative of Section 8 (a) (1) of the Act. The subsidiary facts on which this finding and conclusion rest are summarized below:

- A. The Union files a petition for representation and respondent expresses doubt as to the extent of the Union's support**

On November 6, 1957, the International Longshoremen's and Warehousemen's Union, herein called the Union, filed a petition with the Board's Regional Office in San Francisco, requesting certification as the bargaining representative for a unit composed of all respondent's non-supervisory production and maintenance employees (R. 14; 76, 98). Paul Doty, one of respondent's attorneys, was present in the Regional Office at the time the petition was filed, and inquired of a Board field examiner in the office whether the Union had made a sufficient showing of interest to support its representation petition (R.

14-15; 98). The field examiner replied that it had (R. 15; 98). Later that day Doty telephoned respondent's General Manager, Winston Handwerker, in Fresno, California, and advised him of the filing of the Union's petition and the apparent sufficiency of its showing of interest (R. 15; 98).

Within a day or so thereafter Handwerker received a copy of the Union's representation petition (R. 14; 77, 83). He telephoned Doty in San Francisco and expressed doubt as to the authenticity of the signatures on the Union's authorization cards and as to whether enough cards had, in fact, been signed by respondent's employees to warrant the Board's processing of the representation petition (R. 15; 83-84, 98-99). In accordance with Handwerker's request, Doty returned to the Board's Regional Office where he learned that approximately eighty per cent of respondent's employees had signed Union authorization cards (R. 15-16; 84-85, 99). The same day Doty telephoned Handwerker in Fresno, and relayed this information (R. 84-85, 88-89). Doty also learned at the Regional Office that the employees' signatures on the Union cards could be authenticated by comparing them with employee endorsements on cancelled payroll checks (R. 16; 99). On December 17, 1957, respondent forwarded its November 8 payroll checks, bearing the endorsements of the employees, to the Regional Office (R. 24; 104). The Regional Director, on December 30, 1957, wrote Kenneth Avery, respondent's general counsel, informing him that the employees' signatures on the Union cards were authentic and that the Union had shown

sufficient interest to support its representation petition (R. 24-25; 104, 111, 146-147).

B. Respondent interrogates the employees as to their union activity

Shortly after Handwerker received a copy of the Union's representation petition he summoned Plant Superintendent Lawrence Young to his office and inquired if Young could ascertain whether the employees had, in fact, signed Union authorization cards (R. 16; 113-114, 121). Young replied that all he had to do was "ask the boys" (R. 16; 114). Later in the day Young, after talking to three or four of respondent's employees, assured Handwerker that "no one had signed [Union cards] or was interested in a union" (R. 16; 115-117).

Three or four days later Young spoke to a group of 40 or 50 employees in the boiler room during a rest period, telling them that he was going to ascertain which employees had signed Union cards, and adding that he would attempt to correct any grievances so that it was unnecessary for the employees to pay a representative (R. 16-17; 48-50, 120-121). Young further stated on this occasion that if any of the employees were unhappy with their working conditions, the Company would assist them in finding other jobs (R. 17; 49, 79). That same day Young called his three foremen, Charles Kuhns, Henry Hayes, and Don Robinson, to his private office and apprised them that a rumor was circulating throughout the plant that most of respondent's employees had signed Union authorization cards (R. 17; 131-132, 135). He charged the three to inquire of their

respective crew members whether they had signed Union cards and whether they were interested in unionization (R. 17; 132, 135). Young also told a group of yard employees that if the Union organized the employees, "the block men will come out in the yard and take the jobs" of the yard men (R. 18-19; 58-59, 68).

C. Respondent obtains employee signatures on an anti-union affidavit

Late in November, the Board's Regional Office notified respondent of a hearing set for December 10 on the Union's representation petition (R. 18; 77, 93, 141-142, 143). On December 4, the Company circulated the following "affidavit" to each of its employees (R. 19; 87, 124-125, 137-138, 144-145):

The undersigned, each for himself, after first being sworn, deposes and says:

That he was on the 6th day of November, 1957, and is now, employed by California Compress Co., Inc., a corporation, at its cotton compressing plant at Nielsen Avenue and Marks Street, Fresno, California, and in such employment performs production and maintenance work; that he has not affixed his signature to any card or paper intending thereby, or being advised that such signature would be used, to support a claim of representation by International Longshoremen's & Warehousemen's Union, Independent, and that he has not knowingly signed any such document.

Pursuant to instructions from Plant Superintendent Young, Foreman Kuhns circulated the affidavit

among all of respondent's employees in the presence of their respective foremen (R. 19-20; 118-119, 124). Kuhns was to obtain the signatures of those employees who had not signed Union cards or who stated that they had signed cards without knowing what they were signing (R. 20; 118, 123).

In the course of circulating the affidavit, Kuhns advised some of the employees that if the Union came in "the block crew is liable to * * * take your job when the work is slack" (R. 71). Shortly thereafter on meeting one Merritts, a 64 year old employee who had signed a Union card, Kuhns stated, "If I were you, at your age, I would take my name off [the Union list] and tell them I didn't know what I was signing." Merritts replied that he had understood his act, and Kuhns reiterated "if I were you, at your age, I would take my name off and tell them I didn't know what I was signing." (R. 20-21; 70, 71.)

Sometime the same day Kuhns told employee Abraham Canty, who had knowingly signed a Union authorization card, that he had a petition which was being signed by those employees who opposed unionization. Kuhns asked Canty to sign the affidavit, but Canty refused, whereupon Kuhns warned "the best thing for you to do is sign this because there's not going to be * * * [an] election. You have been with us a long time and we would hate to see you go." Kuhns further cautioned Canty that if he did not sign he "would be in bad with the Company." Canty then signed the affidavit. (R. 21-22; 50-54, 139.)

Foreman Hayes admitted telling the employees under his supervision that he wanted them to sign

the affidavit whether or not they had signed Union cards (R. 134). Hayes told employee Ross that Ross should sign the affidavit as he had not known what he was signing when he signed the Union card (R. 23; 72-73). Ross was well aware of the purpose of the Union card at the time he signed it, but he also signed the affidavit at Hayes' direction, fearing for his job security if he refused (R. 74-76, 139).

On the day respondent circulated the affidavit, employee Deamour Reason discussed it with Superintendent Young, who stated that if he knew who had signed Union cards, he would fire every one of them (R. 23; 56-57, 65).

By 10 a.m. the next morning Kuhns finished circulating the affidavit and obtained the signatures of all respondent's non-supervisory employees except two or three who refused to sign (R. 20; 124-127). He returned it to Avery, respondent's attorney, who on or about the same day advised the Board that respondent would agree to a consent election (R. 106-108, 127). A few days later the Board informed respondent that a consent election could not be held because on December 9 the Union had filed an unfair labor practice charge against respondent (R. 3, 100, 101-102). Within two weeks thereafter, the Union advised counsel for respondent that it would withdraw its unfair labor practice charge if respondent would still agree to a consent election, but respondent now declined (R. 102, 108-109).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts the Board found that by interrogating employees as to their union membership, by circulating the affidavit to each employee, thus requiring him to reveal whether he was a union member, and by procuring employee signatures to the anti-union affidavit, respondent interfered with, restrained, and coerced the employees in the exercise of their rights under Section 7, thereby violating Section 8 (a) (1) of the Act (R. 33). In so holding the Board, for reasons discussed *infra*, rejected respondent's contention that it was merely engaged in a permissible means of ascertaining whether the Union had sufficient support to warrant the Board's proceeding with the representation case (R. 33).

Accordingly, the Board ordered respondent to cease and desist from such interrogation or polling and from like or related violations of the Act, and to post appropriate notices (R. 34-35).

ARGUMENT

THE BOARD PROPERLY FOUND THAT RESPONDENT UNLAWFULLY INTERROGATED AND POLLED ITS EMPLOYEES AS TO THEIR UNION MEMBERSHIP, THEREBY VIOLATING SECTION 8 (a) (1) OF THE ACT

The facts summarized above establish that respondent systematically inquired of each employee whether he had signed a Union card, by soliciting the signature of each to an affidavit repudiating the Union. Respondent accompanied this solicitation by coercive statements such as that the yard men would

lose their jobs if the Union came in, that an employee who failed to sign would be "in bad" with the Company, that the Company "wanted" the employees to sign, and that an elderly employee, in view of his age, should heed the foreman's advice and sign. The superintendent on the very day the affidavit was circulated told an employee that if he knew which employees had signed Union cards he would discharge every one of them.² The Board's holding that under these circumstances the interrogation and polling of the employees constituted unlawful interference, restraint, and coercion accords with settled law.

As this Court has noted, employer "interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 904. In a later case, *N.L.R.B. v. Roberts Brothers*, 225 F. 2d 58, 60, this Court stated that whether the polling of employees as to their union affiliation violated the Act depends on the circumstances of each case. But in *Roberts*, as in the Eighth Circuit case there relied on (*N.L.R.B. v. Protein Blenders, Inc.*, 215 F. 2d 749), the poll consisted of a secret ballot, unaccompanied by any coercive statements, whereas in the instant case the poll

² Insofar as respondent's witnesses denied the statements attributed to them, they raised only questions of credibility which "for obvious reasons . . . were for the examiner" *N.L.R.B. v. State Center Warehouse*, 193 F. 2d 156, 157 (C.A. 9).

enabled the employer to identify the employees who supported the Union, and the employer uttered coercive statements in the course of polling the employees. Moreover, unlike the polling in the *Roberts* and *Protein* cases, respondent did not frame a simple “for” or “against” ballot, but instead drafted a statement “skillfully worded so as to suggest adverse criticism of the Union, and the implication is plain that [an anti-union] vote is desired” *N.L.R.B. v. Sunshine Mining Co.*, 110 F. 2d 780, 786 (C.A. 9), certiorari denied, 312 U.S. 678. Indeed, to call the Company-circulated affidavit a “poll” is to give it undue dignity; the affidavit more closely resembled the anti-union petition which this Court held was unlawfully circulated in *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 261-262, certiorari denied, 348 U.S. 829; see also, *N.L.R.B. v. Birmingham Pub. Co.*, 262 F. 2d 2, 7-8 (C.A. 5).

Nothing in *N.L.R.B. v. Katz Drug Co.*, 207 F. 2d 168 (C.A. 8), or in *Pratto d/b/a Globe Iron Foundry*, 112 NLRB 1200, justifies the Company’s conduct. In *Katz* the employer obtained the information as to union membership in the course of preparing for trial in a state court, and in obtaining the information the employer “to safeguard against the semblance of any color of intent to coerce or persuade” “scrupulously observed” his attorney’s direction to “merely give the affidavit forms to the employees individually, ask them to read the form and sign it or not sign it, as they wished, and say nothing more.” 207 F. 2d at 170. Finally, in sharp contrast to the instant case, not only were the *Katz* affidavits intended to serve a legitimate purpose in the state

court proceeding (207 F. 2d at 171-172), but the employees were aware of this legitimate purpose (*id.* at 172). As for the *Globe Foundry* case, on which respondent particularly relied, nothing in that decision establishes that the employer circulated the affidavit there involved, let alone that its circulation was accompanied by coercive comment. Hence, even assuming, *arguendo*, that an employer may lawfully investigate the extent of union support instead of waiting for the question to be resolved in a Board election, the Board had ample warrant for finding, as it did (R. 33), that respondent's purpose was to undermine the Union and not to gather evidence to assist the Board in determining the authenticity of the Union's showing of interest in the representation case.³ Cf. *N.L.R.B. v. J. I. Case Co.*, 201 F. 2d 597, 598-599 (C.A. 9), indicating that the substantiality of the union's showing of interest is a matter of administrative concern only and warning against "disclosure of the individual employees' desires with respect to representation [which] would violate the long-established policy of secrecy of the employees' choice in such matters" (201 F. 2d at 600).

³ Neither Section 8 (c) of the Act nor the First Amendment protect unlawful interrogation. *N.L.R.B. v. Williams Lumber Co.*, 195 F. 2d 669, 672 (C.A. 4), certiorari denied, 344 U.S. 834, and cases cited.

CONCLUSION

For the reasons stated above, a decree should be entered enforcing the order of the Board.

Respectfully submitted,

STUART ROTHMAN,
General Counsel,

THOMAS J. McDERMOTT,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FREDERICK U. REEL,
DONALD J. BARDELL,
Attorneys,
National Labor Relations Board.

August 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

No. 16,422

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

CALIFORNIA COMPRESS COMPANY, INC.,
Respondent.

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**REPLY BRIEF FOR THE
CALIFORNIA COMPRESS COMPANY, INC.,
RESPONDENT**

AVERY, MEUX & GALLAGHER,
605 Security Bank Building,
Fresno, California,

DOTY & QUINLAN,
415 T. W. Patterson Building,
Fresno, California,

Attorneys for Respondent.

FILED

SEP 14 1959

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Jurisdiction	1
Statement of Facts	1
A. Evidence is not responsive to the allegations set forth in the Complaint	3
B. The trial examiner and the Board erred in adopting the findings of fact and conclusions of law in the Intermediate Report and Recommended Order of the Trial Examiner	6
Argument	8
Conclusion	14

Authorities Cited

Cases	Pages
Blue Flash Express v. NLRB, 34 LRRM 1384.....	6
Globe Iron Foundry, 112 NLRB 1200.....	5, 11, 12
Goldblatt Brothers, Inc., 119 NLRB 1711.....	10
International Aluminum Co., 117 NLRB 1224.....	11
J. L. Branders & Sons, 145 F. 2d 556.....	10
Louisville Cab Co., 120 NLRB 103.....	10
NLRB v. Associated Dry Goods Clerks, 209 F. 2d 593.....	9
NLRB v. East Texas Motor Freight Lines, CA 5 (1944) 140 F. 2d 144	9
NLRB v. International Pen Co., CA 7, 162 F. 2d 680.....	9

	Pages
NLRB v. McCatron, 216 F. 2d 212.....	9
NLRB v. Protein Blenders, 215 F. 2d 749.....	9
NLRB v. Superior Oil Co., 199 F. 2d 39.....	9
NLRB v. Western Ohio Gas Co., 172 F. 2d 685.....	9
Pennsylvania Power & Light Co., 44 LRRM 1422.....	14
Peoples Drug Stores, Inc., 119 NLRB 634.....	10
Royal Jet, Inc., 113 NLRB 1064.....	11

Statutes

Labor Management Relations Act:

Section 2(6) (7)	1
Section 10(e)	1

National Labor Relations Act, as amended (61 Stat. 136):

Section 8(a) (1)	3, 12
Section 8(a) (3)	3
Section 8(c)	5
Section 7	4, 12

First Amendment to the Constitution	5
---	---

National Labor Relations Board's Rules and Regulations and Statements of Procedure, Section 101.8	6
--	---

Textbooks

"How to take a case before the National Labor Relations Board," by Louis G. Silverberg, Director of Information for the National Labor Relations Board, at page 71.....	11
---	----

No. 16,422

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

CALIFORNIA COMPRESS COMPANY, INC.,

Respondent.

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**REPLY BRIEF FOR THE
CALIFORNIA COMPRESS COMPANY, INC.,
RESPONDENT**

JURISDICTION

It is conceded that Respondent, California Compress Company, Inc., was and is engaged in interstate commerce within the meaning of Section 2(6)(7) of the Labor Management Relations Act and that this Court has jurisdiction pursuant to Section 10(e) thereof.

STATEMENT OF FACTS

The uncontroverted facts show that on November 6, 1957, the International Longshoremen's and Ware-

housemen's Union petitioned the National Labor Relations Board, 20th Region, requesting certification as the Collective Bargaining Representative of Respondent's employees. The Respondent was immediately notified that a petition for representation had been filed but seriously and in good faith doubted the authenticity of any signature cards which purported to show a sufficient showing of interest and in good faith doubted that any of its employees were seeking Union representation. On or about November 8, 1957, Lawrence Young, Plant Superintendent, spoke to a group of employees in the boiler room or smoke room. On December 5 and 6, 1957, the Respondent caused to be circulated an affidavit or document (General Counsel's Exhibit 2) which reads as follows:

“State of California,
County of Fresno—ss.

“The undersigned, each for himself, after first being sworn, deposes and says:

“That he was on the 6th day of November, 1957, and is now, employed by California Compress Co., Inc., a corporation, at its cotton compressing plant at Nielsen Avenue and Marks Street, Fresno, California, and in such employment performs production and maintenance work; that he has not affixed his signature to any card or paper intending thereby, or being advised that such signature would be used, to support a claim of representation by International Longshoremens' & Warehousemen's Union, Independent, and that he has not knowingly signed any such document.”

(82 employees signed this document.)

On December 9, 1957, the International Longshoremen's and Warehousemen's Union, hereinafter referred to as the "Union", filed unfair labor practices charges against Respondent, in case 20-CA-1366, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136), hereinafter called "the Act". A hearing was held in Fresno, California, before Trial Examiner Howard Myers, on March 18 and 19, 1958. The Respondent filed Exceptions to the Trial Examiner's Report. The National Labor Relations Board delegated its powers in connection with this case to a three-member panel and said panel rendered its Decision and Order on May 5, 1958, adopting the Findings, Conclusions and Recommendations of the Trial Examiner, holding that the Respondent had violated Section 8(a)(1) of the Act (see R. 32-35).

A. Evidence Is Not Responsive to the Allegations Set Forth in the Complaint

Respondent alleges that the Decision and Order of the Board was based upon hearsay and inference, respectfully submits that the Order was not based upon the preponderance of proper and legal evidence, and that the Findings of Fact and Conclusions of Law are contrary to the credible evidence when the entire record is considered, in that the evidence and proof adduced at the hearing before the Trial was not responsive to the allegations and requirements of notice as set forth by petitioner's complaint. The Complaint and Notice of Hearing in Case No. 20-CA-1366

(General Counsel's Exhibit 1-C; R. 3), in the charging paragraph (paragraph VII, in subparagraph A), alleges:

"On or about November 20, 1957, plant superintendent, Lawrence A. Young, interrogated and questioned employees as to their union activities and sympathies and warned and threatened them with loss of overtime, loss of earnings, and discharge, if they favored, joined, or assisted the Union."

The record is entirely devoid of any testimony relating to any acts or conversations participated in by Mr. Young on or about November 20, 1957. Benny Walls testified as to a yard conversation, which testimony alleges that Superintendent Young told some of the yard employees that if they did go Union, the block crew would come out and take their jobs. This testimony, by the statements of the witness, took place several days prior to the boiler room talk on November 8 and therefore, if the statements were made, which are denied, they were made prior to the filing of the petition by the Union and at a time when there was no organizational activity known to be in progress (R. 67). Further, this testimony was entirely uncorroborated by any of the other witnesses and employees alleged to have been present at the time it took place. Certainly, this does not violate any rights guaranteed employees under Section 7 of the Act.

Subparagraph B of Section VII alleges:

"On or about December 6, 1957, supervisors Lawrence A. Young, C. H. Kuhns, Henry Hayes, Donald Robinson and Charles Coons did circulate or

had circulated an affidavit concerning the union activities and sympathies of the employees among said employees and interrogated and questioned them concerning their union activities and sympathies, and by coercion and threats induced certain of said employees to affix their signatures to the aforesaid affidavit.”

Obviously, the Trial Examiner and the Board erred in determining that this affidavit was one concerning Union activities and sympathies of the employees. A careful reading of the document clearly discloses that no such inference can be drawn. The document’s wording followed and copied the language of the *Globe Iron Foundry* case, 112 NLRB 1200. Insofar as the supervisor interrogating and questioning the employees “about their union activities and sympathies, or by coercion and threats inducing employees to affix their signatures on said affidavit,” the credible evidence does not disclose any statements made which violate the Act and in fact, all statements are protected by the rights of free speech guaranteed by the First Amendment to the Constitution and by Section 8(c) of the Act.

Subparagraph C of Section VII charges:

“On or about December 7, 1957, Superintendent Lawrence A. Young warned and threatened certain employees that if they had not signed the aforesaid affidavit concerning the union activities and sympathies of the employees they would have been discharged.”

Certainly, this paragraph needs very little comment. It is correlative to a statement that “if you had com-

mitted murder, you would have gone to jail.” It shows no coercion, threats of reprisal, or promises of benefit, which would violate the provisions of the Act. Coercion by its very nature requires knowledge by the person coerced. How can an expression of intent influence an act (signing the affidavit), when it occurs subsequent to the act alleged to have been motivated by the coercion? It is interesting to note that three employees did not sign and no employees were discharged or otherwise discriminated against.

A motion was made by Respondent during the hearing, requesting that the present case be dismissed, inasmuch as the evidence was not responsive to the allegations charged in the complaint, as required by Section 101.8 of the Board’s Rules and Regulations and Statements of Procedure.

B. The Trial Examiner and the Board Erred in Adopting the Findings of Fact and Conclusions of Law in the Intermediate Report and Recommended Order of the Trial Examiner

In the Intermediate Report and Recommended Order, the Trial Examiner (R. 16, 17) relies upon the fact that Mr. Young spoke to some 40 or 50 employees in the boiler room or smoke room. Of the six witnesses who testified, only one made the statement that Mr. Young stated he was “going to ascertain who had signed.” This was denied emphatically by Mr. Lawrence Young. An employer, under the case decisions, is entitled to talk to his employees during a Union organizational campaign, as long as he does not use threats of reprisal or promises of benefit (*Blue Flash Express v. NLRB*, 34 LRRM 1384).

The Board relied heavily on the testimony of Benny Walls in the purported statement, "The block men will come out in the yard and take the jobs" of the yard men. Any person familiar with the cotton compress industry would know that this would be impractical and impossible, as the block crew are the key men who operate the heavy equipment inside the plant and of necessity must be maintained there. It is a custom and practice, contractual and otherwise, throughout this industry (unionized and non-unionized), for the block crews to be given maximum employment in the pre-season and post-season work. At these times, block crews may be employed in the yard when the block is not in operation. This conversation was emphatically denied by Mr. Young and even if made, it would have only related to the Union contract provisions existing in this area, and such discussions do not violate the provisions of the Act.

Great weight was placed upon the testimony of employee Canty and quotes from the record this testimony in his Intermediate Report and Recommended Order. The credibility of this witness can be attacked clearly by the statements as set forth therein. On R. page 22, the witness stated, "Well, the majority signed it already so he pointed out several names to me. I saw the name Shirley Richardson and Bonny Merrits. Those were the only two men that signed it (General Counsel's Exhibit 2) that knew what they were signing." A careful scrutiny and examination of General Counsel's Exhibit 2 will disclose that neither of the names, Bonny Merrits or Shirley Rich-

ardson, appeared thereon and it is obvious that if this statement is false (R. 125), the other testimony cannot be relied upon. The testimony of employee Demour Reason can be entirely discredited, in accordance with the facts set forth in Respondent's Brief to the Board (pages 7 and 8), in Case No. 20-CA-1366. It was physically impossible for the conversation with Mr. Young to have taken place. In fact, Reason's testimony was so incredible that the Board caused to be printed less than three pages of some ten pages of testimony at the Hearing.

ARGUMENT

The argument of the petitioner in its Brief for the National Labor Relations Board is not supported by the evidence, as the petitioner argues that the Respondent "systematically inquired of each employee whether he had signed a Union card, by soliciting his signature on an affidavit repudiating the Union." Any person of reasonable intelligence can read this document and see that it does not inquire as to whether or not an employee has signed a Union card, nor does the document repudiate the Union. The Respondent denies that any coercive statements were used at the time this document was circulated. The petitioner states that the supervisors stated that the Company "wanted" the employees to sign and that an elderly employee, in view of his age, should heed the foreman's advice and sign. Careful reading of this testi-

mony (R. 71) will show that this statement, if made, was merely a statement of the opinion of the Supervisor and did not constitute a violation of the Act. *NLRB v. International Pen Co.*, C.A. 7, 162 F. 2d 680, which sets forth the rule that a company is not responsible for supervisors' statements of their personal opinions.

The employer has a right under the law to talk to employees. In *NLRB v. East Texas Motor Freight Lines*, C.A. 5 (1944), 140 F. 2d 144, it was held proper for the employer, through its manager, to ascertain whether employees had, in fact, organized a union. In *NLRB v. McCatron*, 216 F. 2d 212, the court held that interrogation which does not contain an express or implied threat or promise does not of itself violate the Act. In *NLRB v. Protein Blenders*, 215 F. 2d 749, it was held that interrogation or polling concerning Union membership is not per se a violation of the Act. Employers may make inquiries of employees during Union organizational campaigns, providing the inquiries contain no threats or promises (*NLRB v. Associated Dry Goods Clerks*, 209 F. 2d 593, and *NLRB v. Superior Oil Co.*, 199 F. 2d 39). In *NLRB v. Western Ohio Gas Co.*, 172 F. 2d 685, the attorneys for the company drew a petition for withdrawal from the union and another petition in favor of retention of the union. Every employee except one signed the petition for withdrawal. It was held that the employer was not guilty of coercing the employees in the exercise of their rights and in this method, each employee clearly disclosed his union affiliation and/or

sympathies to the employer, which was not done in the case at hand. In *J. L. Branders & Sons*, 145 F. 2d 556, the National Labor Relations Board held it was no unfair labor practice, in view of the employer's established policy in allowing free expression on labor matters.

During an election campaign, an employer is privileged to address his assembled employees on his premises. It is "the natural forum for him." (*Goldblatt Brothers, Inc.*, 119 NLRB 1711.)

In absence of coercive remarks, such employer may make pre-election speeches and such speeches are not considered as interfering with a free election (*Louisville Cab Co.*, 120 NLRB 103).

In *Peoples Drug Stores, Inc.*, 119 NLRB 634, the majority of the Board pointed out that a retail store employer, as any other employer, is free to assemble his employees on the premises during working hours or to talk to the employees individually at their work stations.

It appears that the National Labor Relations Board in its Decision and Order overlooked the *basic principle* involved in this matter, that is, the Respondent had a good faith doubt that the Union represented any of its employees and with uncoercive questioning determined that none of the employees wanted the Union. It thereupon prepared the affidavit for the purpose of submitting it to the Board to assist the Regional Offices of the National Labor Relations Board in making a determination of whether or not

there was a sufficient showing of interest. As of this date, the employer has knowledge that seven employees favored the Union. The National Labor Relations Board administratively determines whether or not a petitioning Union has made a sufficient showing of interest and they have administratively established that 30% of the employees in an appropriate bargaining unit will constitute a sufficient showing of interest. *International Aluminum Co.*, 117 NLRB 1224. The Respondent's objective was to point out to the Board that there was no interest and that if authorization cards had been signed by the employees, they should be carefully scrutinized to determine their authenticity and current nature. In the book, "How to take a case before the National Labor Relations Board", by Louis G. Silverberg, Director of Information for the National Labor Relations Board, it is stated at page 71:

"However, the Board has conducted special investigations and held collateral hearings into the nature of the showing of interest (e.g. whether the authorization cards were fraudulent). A party may obtain such investigation if it should submit data (e.g. affidavits) which are of sufficient weight to cast doubt on the reliability of the petitioner's showing of interest. This data, which will not be accepted as evidence at the representation hearing, may be submitted to the regional director or to the Board in Washington."

Mr. Silverberg, in connection with this statement, cites *Globe Iron Foundry*, 112 NLRB 1200 and *Royal Jet, Inc.*, 113 NLRB 1064.

This is the recommended procedure and is exactly what was done by the Respondent in this case. The Respondent followed the strict wording of the *Globe Foundry* case.

Further evidence of the inadequacy of petitioner's showing of interest, or limitations, or current nature of the authorization cards can be evidenced by an examination of the General Counsel's Exhibits 5 and 6 (R. 139). They clearly show that the dates have been altered on the application submitted into evidence by the General Counsel. Also, it is obvious that the dates on said exhibits are in a different handwriting than that of the employee applicant. It is not the position of the Respondent that this Court should determine if there is a sufficient showing of interest, but it was the position of the Respondent at the time the affidavit was circulated that the Board should review the sufficiency of the showing of interest and the Board did not administratively make a final determination until December 30, 1957.

The real test of whether an employer has interfered and coerced employees within the meaning of Section 8(a)(1) of the Act is whether the employer is engaged in conduct which tends to interfere with the free exercise of the employee's rights as guaranteed by Section 7 of the Act. Section 7 states:

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).''

Certainly, after the circulation of the non-coercive affidavit, the rights of the employees as guaranteed under this section have not been impaired. They were, and are, free to select their own collective bargaining representative or to refrain from so doing in a secret ballot election, in accordance with the provisions of the Act.

It is also clear that the affidavit was not per se a document which inquired as to the Union sympathies of employees, nor was it coercive in nature. Therefore, the only question is whether or not the interrogation, if any, had a coercive effect. Superintendent Young's boiler room speech clearly is permissible under the decisions previously cited. There then remains only a few isolated controverted statements alleged to have been made by supervisors employed by the company. During the organizational period prior to the filing of the unfair labor practice charges, a period of 32 days, in a plant employing in excess of 86 employees, it would be a miracle if some statements were not made by the employees and their supervisors in regard to the organizational activity. Respondent's management clearly sought to obey and follow the law. They employed two attorneys for the

purpose of advising them and they cautioned their supervisors not to inquire as to the Union activities of employees and to make it very clear that Union organization would not affect their employment (R. 118, 145). It is further interesting to note that no employee was discharged or otherwise discriminated against because of Union activity.

We believe that the policies of the Act can best be effectuated by permitting the adverse parties in their representation proceeding to express their views, rather than prohibiting all forms of free speech. If there was an isolated statement made by a supervisor during this organizational period, it alone should not be the basis of finding the Respondent guilty of unfair labor practices (*Pennsylvania Power & Light Co.*, 44 LRRM 1422).

CONCLUSION

The Court of Appeals has jurisdiction to reverse an Order of the National Labor Relations Board for error of law or lack of substantial evidence to support the Board's findings. We feel that the Board has failed to scrutinize the entire record, in light of the allegations set forth in the complaint. The Respondent used legitimate and permissible tactics. For the Court to hold otherwise would deprive the Respondent of Constitutionally guaranteed rights of free speech. The rights of employees under the Act have not been interfered with. We therefore pray that

the Court make and enter its Decree dismissing this proceeding and denying enforcement of the Board's Decision and Order.

August 28, 1959.

Respectfully submitted,

AVERY, MEUX & GALLAGHER,

DOTY & QUINLAN,

By PAUL K. DOTY,

Attorneys for Respondent.

IN THE
United States
Court of Appeals
For the Ninth Circuit

CHESTER THOMAS VANDABLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JACK D. H. HAYS

United States Attorney

For the District of Arizona

MICHAEL A. LACAGNINA

Assistant United States Attorney

412 U. S. Post Office and

Court House Building

Tucson, Arizona

Attorneys for Appellee

SUBJECT INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I Did the trial court err in failing to dismiss the cause on the grounds and for the reasons that the defendant was denied a speedy and impartial trial as guaranteed under the United States Constitution?	4
II Did the trial court err in failing to advise Appellant that he could have taken the stand in his own behalf even though Appellant was acting as his own attorney?	6
III Appellant's argument raised in Question A(4)	7
IV Appellant's argument raised in Question A(5)	7-8
V Did the Trial Court err in denying Defendant's Motion for a New Trial on the grounds set forth in his motion for a New Trial?	9
CONCLUSIONS	10

TABLE OF AUTHORITIES

CASES

	Page
Adams v. U.S. ex rel. McCann, 37 U.S. 269, 63 Sup. Ct. 336, 87 L.Ed. 268, 143 A.L.R. 435	6
Apodaca v. U.S., 190 F. 2d. 687, 2nd Cir.	8
Burstein v. U.S., 178 F. 2d 665	7
Johnson v. Zerbst, 304 U.S. 458	6
Newman v. U.S., 238 F. 2d 861, 5th Cir.	8
Nolan v. U.S., 163 F. 2d 768, 8th Cir.	5
Patterson v. U.S., 183 F. 2d 327, 4th Cir.	8
Pietch v. U.S., 110 F. 2d 817	6
Shepard v. U.S., 163 Fed. 2d 974, 8th Cir.	4

STATUTES

18 U.S.C.A. Section 1708	1
18 U.S.C.A. Section 3231	1
28 U.S.C.A. Sections 1291 - 1294	1

IN THE
United States
Court of Appeals
For the Ninth Circuit

CHESTER THOMAS VANDABLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Arizona adjudging Appellant to be guilty of an indictment charging defendant with a violation of Section 1708 of Title 18, United States Code, theft of mail.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under provisions of Sections 1291 and 1294 of Title 28, United States Code.

STATEMENT OF THE CASE

Appellee would like to supplement Appellant's statement of the case with the following resume' of the facts of the case.

The prosecution grew out of an investigation conducted by Edwin S. Samppala, Postal Inspector, United States Post Office Department, as to the theft of the mails in the City of Globe area of the State of Arizona, particularly the taking of mail from the rural box of Mrs. LeRoy Tucker, on the U. S. Payson Star Route, Globe Arizona. Appellant gave a signed confession admitting the theft from the mails.

An indictment was returned by the Grand Jury on April 8, 1958 charging the Appellant herein with the theft of the mail in question. At the time the indictment was returned by the Grand Jury and filed, the Appellant was in the custody of the Gila County Sheriff for violation of a criminal statute of the State of Arizona. Appellant admitted the theft to the Gila County Sheriff enroute to Arizona. A retainer or hold was placed on the Appellant by the United States Marshal pending the final disposition of the Appellant by the State of Arizona. On or about November 1, 1958 the Appellant was released into the custody of the United States Marshal and on November 7, 1958 he was brought before the United States District Court for the District of Arizona for arraignment and pleaded not guilty. Appellant's trial was set for December 9, 1958 and on that date the trial was held before a jury and Appellant was found guilty as charged.

The United States District Judge for the District of Arizona, James A. Walsh, attempted to appoint counsel to represent Appellant after Appellant discharged his own attorney. Page 3, lines 1-3, December 1, 1958 Proceedings. Appellant refused council and advised the Court that it was his desire to conduct his own

defense and he did conduct his own defense on December 9, 1958.

On December 22, 1958, the Honorable James A. Walsh sentenced the Appellant to the custody of the Attorney General or his authorized representative for a period of four years.

ARGUMENT

Throughout this section of the brief we will attempt to answer the arguments as raised in Appellant's Brief under their section "Argument " and will refer to the different points raised under similar numbers and headings with reference to page numbers in the Appellant's Brief as well as to pages in the printed transcript. If reference is to pages in Appellant's Brief it will be so stated.

Appellant was not denied his right to a speedy trial. While incarcerated by the authorities of the State of Arizona, Appellant never made a demand to the District Court for a trial and therefore he is not in a position now to claim that his rights were violated. The Appellant's incarceration by the State of Arizona was a circumstance beyond the control of the Appellee and satisfactorily explains the alleged delay assigned as error by the Appellant.

Appellant has the right to be represented by counsel but this right can be waived and in the present case Appellant intelligently waived his right to be represented by counsel. Appellant chose to assert his right to represent himself and the Court was without power to force an attorney upon the Appellant against his wishes. Having chosen to represent himself Appellant did not have the right to have the trial judge act as his counsel.

The denial of Appellant's Motion for a New Trial rested in the sound discretion of the trial judge and should not be disturbed.

There is no showing of an abuse of discretion on the part of the trial court.

I.

DID THE TRIAL COURT ERR IN FAILING TO DISMISS THE CAUSE ON THE GROUNDS AND FOR THE REASONS THAT THE DEFENDANT WAS DENIED A SPEEDY AND IMPARTIAL TRIAL AS GUARANTEED UNDER THE UNITED STATES CONSTITUTION? App. Br. p. 14.

Appellee contends that Appellant was given a speedy and impartial trial as guaranteed to him under the United States Constitution.

A look at the case cited by Appellant, *Shepard v. U.S.*, 163 Fed. 2d 974, 8th Cir., clearly shows what is meant by a speedy trial and also what steps a defendant must take in order to claim later that he was denied a speedy trial. At page 976 of that opinion the Court said:

"A speedy trial, generally speaking is one conducted According to prevailing rules, regulations and proceedings of law, free from arbitrary, vexatious and oppressive delays. The right does not require a trial immediately upon the return of an indictment, nor an arrest made under it, but it does require that the trial shall be had as soon as reasonably possible, after the indictment is found, without depriving the prosecution of a reasonable time in which to prepare for trial. Delays which have been caused by the accused himself cannot, of course be complained of by him. The right of the accused to a discharge for failure of the prosecution to give him a speedy trial is a personal one to him and may be waived. *He must assert the right if he wishes its protection*

and if he does not make a demand for trial or resist a continuance of the case, or if he goes to trial without objection that the time limit has passed, or fails to make some kind of effort to secure a speedy trial, he will not ordinarily be in a position to demand dismissal because of delay in prosecution,—”

The record shows that Appellant was taken into custody by the United States Marshal on November 1, 1958; arraigned on November 7, 1958 and tried by the Court and Jury on December 9, 1958. It is obvious he was not denied a speedy trial.

Appellant contends that he was held from February to December before he was tried. The record shows (Testimony of Jack Jones, Sheriff, Transcript of Proceedings December 9, 1958, page 22, lines 11-25, and page 29 at lines 5-11), that Appellant was being held by and for the State of Arizona for violation of one of their own criminal statutes and was not available to Appellee for prosecution until November 1, 1958.

“Except for some rule of comity recognized by statute when one system of courts takes jurisdiction of a thing or person that thing or person is withdrawn from the judicial power of the other.”

Nolan vs. U.S., 163 F. 2d 768, 8 Cir.

The Court in the Shepard case, *supra*, commenting on a delay for prosecution, said at page 978, note (9, 10).

“The right of a speedy trial is relative. It is not inconsistent with delays but depends upon circumstances and here the delay is satisfactorily explained by the government.”

APPELLEE contends that the long delay asserted by Appellant

has been satisfactorily explained.

The record further shows (Transcript of Proceedings December 9, 1958, page 43, line 5-14), that Appellant, while in the custody of the State of Arizona, did not make a demand to the District Court for a trial, even though during that time he was represented by council of his own choice. The Court, in *Pietch v. U.S.*, 110 Fed. 2d 817, page 819, said:

"A person charged with a crime cannot assert with success that his right to a speedy trial guaranteed by the 6th amendment to the Constitution of the United States has been invaded *unless he asked for a trial. In the absence of an affirmative request or demand for trial made to the Court it must be presumed that Appellant acquiesced in the delay and therefore cannot complain.*"

II.

DID THE TRIAL COURT ERR IN FAILING TO ADVISE APPELLANT THAT HE COULD HAVE TAKEN THE STAND IN HIS OWN BEHALF EVEN THOUGH APPELLANT WAS ACTING AS HIS OWN ATTORNEY? App. Br. p. 16.

It is well settled that an accused in a criminal case has the right to counsel. It is equally true that an accused has the corresponding right to represent himself.

"The Court does not force a lawyer upon a defendant."

Adams v. U.S. ex rel. McCann

37 U.S. 269, 63 Sup. Ct. 336

87 L. Ed. 268, 143 A.L.R. 435

"The right to assistance by counsel can be waived by an individual defendant if he knows what he is doing and his choice is made with eyes wide open."

Johnson v. Zerbst, 304 U.S. 458 (468-69)

The trial Court cautioned Appellant about the pitfalls of acting as his own attorney. (Transcript of Proceedings December 1, 1958, page 3, lines 5-21). Appellant waived his right to counsel and decided to represent himself in spite of the Court's warning and now assigns error on the very point he was cautioned about.

In the case of *Burstein v. U.S.*, 178 Fed. 2d 665, 9th Cir. the Court clearly pointed out at page 670:

"When Appellant chose to proceed without counsel, he chose a course of action fraught with the danger that he would commit legal blunders. But having made that choice he did not thereby acquire the right to have the Court act as his counsel whenever he seemed to be blundering. It cannot be said that the Court denied him representation of counsel, or denied him a fair trial because the Judge refrained from intermeddling."

Appellant waived his right to be represented by counsel and chose to represent himself, which he had the right to do. Having done so, Appellant did not have the right to have the Trial Judge act as his counsel.

III.

Appellant's Argument raised in Question A(4) on pages 20, 21, 22 of his brief is without merit, and contrary to the record. The Court did give an instruction to the jury covering the admissibility of confessions and therefore no error was made. (Transcript of Proceedings December 9, 1958, page 57, line 12-22).

IV.

Appellant's Argument raised in Question A(5) on pages 22, 23, 24 of his brief is without merit, and contrary to the record.

The Court did instruct the jury that Appellant had the right to represent himself. (Transcript of Proceedings, December 9, 1958, page 63, line 2).

V.

Did the Trial Court err in denying Defendant's Motion For a New Trial on the grounds set forth in his Motion for a New Trial?

The granting of a new trial is a matter resting in the sound discretion of the Trial Court which may not be disturbed in absence of abuse.

Patterson v. U.S., 183 F. 2d 327, 4th Cir.

Newman v. U.S., 238 F. 2d 861, 5th Cir.

Apodaca v. U.S., 190 F. 2d 687, 2nd Cir.

Weight should be given to the decision of the presiding judge in denying motion for a new trial, since he saw witnesses and heard them testify. The presiding judge was present when the Appellant conducted his defense and weight should be given to his decision that Appellant was given a fair and impartial trial. The presiding judge took into consideration Appellant's inexperience in Courtroom procedure and in his sound discretion rightfully denied Appellant's motion for a new trial and his reasons for so doing appear in the Record.

"THE COURT: I tried to tell you when we were determining whether we would have counsel appointed or to represent yourself that you would have difficulty. I pointed out to you some misunderstanding that you already had as to the law."

Transcript of Proceedings, December 1, 1958 at page 7A, line 22.

"THE COURT: On the matter of the driver's license, of course, that was not controverted; it was a question for the

jury and the jury decided.”

Transcript of Proceedings, December 1, 1958 at page 8, lines 22, 23, 24.

A look at the record will show that Appellant was well represented by himself. Appellant has been at odds with the law for many years and was familiar with case law procedure and his rights.

1. Appellant cited the Jencks case of 1956.

Transcript of Proceedings, December 1, 1958 lines 17 and 18.

2. Appellant makes motion for new trial.

Transcript of Proceedings, December 1, 1958, page 7A, lines 5, 6, 12-21.

3. Appellant serves notice of appeal and files petition for leave to appeal forma pauperis.

Transcript of Proceedings, December 1, 1958, pages 12 and 13,

4. Appellant elects not to serve sentence.

Transcript of Proceedings, December 1, 1958, page 13, lines 2 and 3.

5. Appellant makes motion for dismissal.

Transcript of Proceedings, December 9, 1958, page 41, lines 16-25, page 42, lines 1-16.

Appellant has argued that he was not advised by the Court that he could testify in his own behalf. A look at Appellant's prior convictions indicates the true reason Appellant did not take the stand in his own behalf.

Transcript of Proceedings, December 1, 1958, pages 9, 10, 11.

The Court did not err in denying Appellant's motion for a new trial. There is no showing by Appellant of an abuse of discretion by the presiding judge.

CONCLUSION.

Appellee contends that the Government's evidence was sufficient to allow the jury to return a verdict of guilty. The Appellant did not introduce any evidence except by cross-examination. Appellant, who has a long prior record of convictions, intelligently waived his right to assistance by counsel offered by the Court. Appellant received a speedy, fair and impartial trial which he was guaranteed by the 6th Amendment of the United States Constitution. The judgment of conviction should be affirmed.

Respectfully submitted,

Jack D. H. Hays
United States Attorney
For the District of Arizona

Michael A. Lacagnina
Assistant United State Attorney

Attorneys for Appellee
412 U. S. Postoffice and
Court House Building
Tucson, Arizona

IN THE
United States
Court of Appeals
For the Ninth Circuit

WILLIAM CHARLES LUCAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JACK D. H. HAYS

United States Attorney

For the District of Arizona

MICHAEL A. LACAGNINA

Assistant United States Attorney

412 U. S. Post Office and

Court House Building

Tucson, Arizona

Attorneys for Appellee



SUBJECT INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	2
I APPELLANT WAS ADEQUATELY REPRESENTED BY COUNSEL	2
II APPELLANT DOES NOT HAVE THE UNQUALIFIED RIGHT TO INSPECT FILES OF THE FEDERAL BUREAU OF INVESTIGATION	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

	Page
FORD v. U.S., 234 F. 2d 835, 77 S.Ct. 364	
352 U.S. 972, 1 L.Ed. (2) 325	6
Jencks v. U.S., 353 U.S. 657, 77 S.Ct. 1007,	
1 L.Ed. (2) 1103	6
Offutt v. U.S., 242 F. 2d 373	5
Stearn v. U.S., 4th Cir., 219 F.2d, 265	7
U.S. v. Miller, 254 F. 2d 523	5
U.S. v. Shelton, 7th Cir., 249 F. 2d 871	7
U.S. v. Sumpter, 111 F. Sup. 507 at 511,	
228 F. 2d 290	5
U.S. v. Wight, 176 F. 2d 376	5
Walker v. U.S. 7th Cir., 218 F. 2d 80	7

STATUTES

18 U.S.C. 3500	6
28 U.S.C. 1291	1
28 U.S.C. 2253	1
28 U.S.C. 2255	1, 2, 3, 5, 8

IN THE
United States
Court of Appeals
For the Ninth Circuit

WILLIAM CHARLES LUCAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from an Order of the United States District Court for the District of Arizona entered on the 5th day of December, 1958 denying Appellant's Motion to Vacate and Set Aside an Illegal Sentence. The jurisdiction of the District Court was based upon Section 2255 of Title 28, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question, under provisions of Section 2253 of Title 28 United States Code and Section 1291, Title 28, United States Code.

STATEMENT OF FACTS

Appellant was tried by a jury in the United States District Court for the District of Arizona at Tucson, Arizona on June 21, 1957 and found guilty. Appellant was tried pursuant to

charges made by the grand jury in an indictment returned May 14, 1957 accusing him of transporting a stolen motor vehicle from Los Angeles, California to Globe, Arizona. On June 24, 1957 Appellant was sentenced to 5 years.

Appellant filed a Motion pursuant to 28 U.S.C. 2255 alleging that he was not adequately represented by a Court appointed counsel.

On December 5, 1958 a hearing on Appellant's Motion was held in Tucson, Arizona before Honorable James A. Walsh. The Government introduced testimony from Mary Anne Reimann, Assistant United States Attorney for the District of Arizona, and John Collins, Esquire, Appellant's Court-appointed attorney. Appellant testified in his own behalf.

The trial court denied Appellant's Motion and made Findings of Fact and Conclusions of Law. This is an appeal from that ruling.

SUMMARY OF ARGUMENT

1. Appellee contends that Appellant was adequately represented by counsel before, after and during his trial.
2. Appellee contends that the Appellant does not have an unqualified right to subpoena all of the files of the Federal Bureau of Investigation regarding his case. This issue was not presented to the Court at the time of the hearing and since it appears here for the first time the Court should disregard it.
3. The Court made Findings of Fact and Conclusions of Law based on the evidence produced at Appellant's hearing and said Findings of Fact were supported by the evidence produced.

I.

APPELLANT WAS ADEQUATELY REPRESENTED BY COUNSEL

The Court appointed John Collins, Esquire, a member of the State of Arizona Bar and admitted to practice before the United

States District Court, to represent Appellant during his trial. Page 33, Record on Appeal, Volume 2, Lines 6-8.

Mr. Collins testified at the hearing held December 5, 1958 on Appellant's Motion to Vacate Sentence, pursuant to 28 U.S.C. 2255. Regarding Appellant's main contention that a witness called for the defense was not allowed to testify, Mr. Collins' testimony was as follows:

"Q. What did you advise him at that time?

"A. I asked Mr. Lucas in view of what she had stated to me was it his request I call her as a witness anyway, and he said no, he did not wish for me to call her."

Record on Appeal, Volume 2, page 34, lines 15 - 18.

As it appears, it was Appellant's desire not to put the witness Pearl Hallam on the stand.

To substantiate Mr. Collin's testimony, Appellant said on cross-examination in the same hearing while reading from a letter he had written while serving his sentence at Leavenworth:

"Q. (By Mr. Lacagnina) I'd like you to look at Government's Exhibit 1 and read where you have written No. 2 through paragraph two. Read it out loud, please.

"A. That I did not place Mrs. Hallam, the mother of Mrs. Calton, on the stand because of her badly strained mental condition at the time, and because of her plea not to do so. I hold too great an admiration for her to subject her to any kind of strain or hurt even though it was to my detriment. She was the only person who was able to prove and discredit some of her daughter's testimony. Possibly you can see my position in this as I believe any person with any consideration for the honor of another would have acted and not called Mrs. Hallam as a witness as in my case." Record on Appeal, Volume 2, pages 22-23, lines 16-25, 1-3.

Appellant did not desire Pearl Hallam to testify because she would only substantiate the Government's case.

"Q. Did your attorney tell you why she wasn't called to the stand?

"A. Yes.

"Q. Why?

"A He said that what short talk he had with her, that it was his feeling she would break down on the stand and that regardless of what had happened, she had told him that she wouldn't say anything opposite to her daughter's testimony."

Record on Appeal, Volume 2, page 8, lines 3-11.

The Court, after hearing the evidence produced at the hearing on December 5, 1958 made the following Finding of Fact regarding this particular issue:

"With regard to the issue of Pearl Hallam and whether or not counsel failed to properly represent the defendant by not putting her on the witness stand, I find that Pearl Hallam didn't get on the witness stand because she advised counsel and counsel advised the defendant that if she did testify, her testimony would be adverse to the defendant, and on that basis she wasn't called and the defendant knew it and was in agreement with it and didn't insist she testify. This letter to the Court indicates, or attempts to indicate, he didn't call her out of the spirit of magnanimity. He would rather suffer defeat in his suit than call this woman on account of her mental condition. His story now is completely opposed to what he wrote me shortly after he was sent to the penitentiary."

Record on Appeal, Volume 2, page 46, lines 7-20.

The Honorable James A. Walsh also found the following from the testimony offered at Appellant's hearing regarding Appellant's failure to take the stand:

"As to his failure to get on the stand himself, I find that happened because he was advised if he got on the witness stand his record would be competent evidence against him of his previous convictions, and then he accepted his counsel's statement or advice he wouldn't call him unless he insisted on getting on."

Record on Appeal, Volume 2, page 46, lines 21-25, page 47, line 1.

To the same effect, see *U. S. vs. Sumpter*, 111 Fed. Sup. 507 at 511.228 Fed. 2d 290, affirmed.

The record does not bear out Appellant's claim that the trial tactics of his counsel were such as to render his aid ineffective. *Offutt v. U.S.*, 242 F. 2d 373.

In the case of *U. S. v. Miller*, 254 F 2d 523, the Court dealing with the same issue said,

"Finally, the claim that his attorney was inefficient was of no avail on a Motion under 2255 unless counsel's failure was such as to make the trial a mockery of justice. *U. S. v. Wight*, 176 F. 2d 376."

In the *Wight* case cited above, the Court sets down the test to be applied when deciding whether or not Appellant was represented by competent counsel.

"The proof of the efficiency of such assistance lies in the character of the resulting proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegation of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the use of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255."

The record clearly shows that Appellant was well represented and after hearing the evidence produced at Appellant's hearing on his Motion the Court concluded:

"There is nothing there that made counsel's representation incompetent or less than it should have been."

Record on Appeal, Volume 2, page 47, lines 1-2.

Appellant received a fair and impartial trial. Appellant was represented by competent counsel and the Court properly denied his Motion to Vacate his Sentence.

"Unsuccessful litigants usually blame their counsel." Ford v. U. S., 234 F. 2d 835, certiorari denied 77 Sup Ct. 364. 352 U. S. 972, 1 L.Ed. (2) 325.

II

APPELLANT DOES NOT HAVE THE UNQUALIFIED RIGHT TO INSPECT FILES OF THE FEDERAL BUREAU OF INVESTIGATION.

Counsel for the Appellant subpoenaed all documents relative to and concerning this case by serving on an agent of the Federal Bureau of Investigation residing in Tucson a subpoena duces tecum.

Appellant does not have the unqualified right to *all* the records and files of the Federal Bureau of Investigation. The Jencks Statute, 18 U.S.C. 3500, provides that no statement or report of a government witness shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination. Furthermore, they must be in the possession of the government and must relate to the subject matter as to which the witness has testified.

The Jencks Statute was passed subsequent to the Jencks case cited by Appellant on page 12 of his brief, 353 U.S. 657, 77 Sup. Ct. 1007, and 1 L.Ed. (2) 1103.

In the present case, Appellant, at page 11 of his brief, sets out

the questions asked by him of the Agent of the Federal Bureau of Investigation. It is noteworthy to mention that in his questions, Appellant never asks the witness whether any documents were in existence, what the documents contained if they were in existence, and whether or not they are in this Agent's possession. These were the questions which were necessary in order for the Court to decide whether or not they should be produced for examination by Appellant. The Agent properly cited Department Order No. 3229, revised, and published in Federal Register. Record on Appeal, Volume 2, page 41, lines 15 - 18, and stated at page 42, line 22 Record on Appeal, Volume 2, that there were no records in Tucson concerning this particular case.

Appellee would like to draw the Court's attention to the fact that at no place in the Transcript of Proceedings of December 5, 1958, Volume 2 of the Record on Appeal, did counsel for Appellant object to the non-production by the Agent of all the files of the Federal Bureau of Investigation, nor did he ask the Court for a ruling on the non-production of the Federal Bureau of Investigation's files. In fact, to this day, no one knows just what Appellant wanted or for what purpose.

Appellant's Argument, designated as Argument No. 2 on page 4 of his brief, is an issue being raised here for the first time and this Court should not give it any consideration.

In the case of U.S. vs. Shelton, 7th Cir., 249 Cir., 249 F. 2d 871 at page 875, the Court said,

"Aside from the fact that this issue was not raised upon the petition in the Trial Court, but has been injected into the cause only on appeal, a situation not justifying us in giving it any consideration * * *. Walker v. U.S. 7th Cir. 218 F. 2d 80; Stearn vs. U.S. 4th Cir., 219 F. 2d 265."

The record clearly shows that Appellant was well represented and after hearing the evidence produced at Appellant's hearing on his Motion the Court concluded:

"There is nothing there that made counsel's representation incompetent or less than it should have been."

Record on Appeal, Volume 2, page 47, lines 1-2.

Appellant received a fair and impartial trial. Appellant was represented by competent counsel and the Court properly denied his Motion to Vacate his Sentence.

"Unsuccessful litigants usually blame their counsel." Ford v. U. S., 234 F. 2d 835, certiorari denied 77 Sup Ct. 364. 352 U. S. 972, 1 L.Ed. (2) 325.

II

APPELLANT DOES NOT HAVE THE UNQUALIFIED RIGHT TO INSPECT FILES OF THE FEDERAL BUREAU OF INVESTIGATION.

Counsel for the Appellant subpoenaed all documents relative to and concerning this case by serving on an agent of the Federal Bureau of Investigation residing in Tucson a subpoena duces tecum.

Appellant does not have the unqualified right to *all* the records and files of the Federal Bureau of Investigation. The Jencks Statute, 18 U.S.C. 3500, provides that no statement or report of a government witness shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination. Furthermore, they must be in the possession of the government and must relate to the subject matter as to which the witness has testified.

The Jencks Statute was passed subsequent to the Jencks case cited by Appellant on page 12 of his brief, 353 U.S. 657, 77 Sup. Ct. 1007, and 1 L.Ed. (2) 1103.

In the present case, Appellant, at page 11 of his brief, sets out

the questions asked by him of the Agent of the Federal Bureau of Investigation. It is noteworthy to mention that in his questions, Appellant never asks the witness whether any documents were in existence, what the documents contained if they were in existence, and whether or not they are in this Agent's possession. These were the questions which were necessary in order for the Court to decide whether or not they should be produced for examination by Appellant. The Agent properly cited Department Order No. 3229, revised, and published in Federal Register. Record on Appeal, Volume 2, page 41, lines 15 - 18, and stated at page 42, line 22 Record on Appeal, Volume 2, that there were no records in Tucson concerning this particular case.

Appellee would like to draw the Court's attention to the fact that at no place in the Transcript of Proceedings of December 5, 1958, Volume 2 of the Record on Appeal, did counsel for Appellant object to the non-production by the Agent of all the files of the Federal Bureau of Investigation, nor did he ask the Court for a ruling on the non-production of the Federal Bureau of Investigation's files. In fact, to this day, no one knows just what Appellant wanted or for what purpose.

Appellant's Argument, designated as Argument No. 2 on page 4 of his brief, is an issue being raised here for the first time and this Court should not give it any consideration.

In the case of U.S. vs. Shelton, 7th Cir., 249 Cir., 249 F. 2d 871 at page 875, the Court said,

"Aside from the fact that this issue was not raised upon the petition in the Trial Court, but has been injected into the cause only on appeal, a situation not justifying us in giving it any consideration * * *. Walker v. U.S. 7th Cir. 218 F. 2d 80; Stearn vs. U.S. 4th Cir., 219 F. 2d 265."

CONCLUSION

There was sufficient evidence presented by both parties at the hearing held pursuant to 28 U.S.C. 2255 on Appellant's Motion to warrant the Honorable James A. Walsh's Findings of Fact and Conclusions of Law, and Appellee respectfully requests that this Court affirm the ruling made by the Trial Court.

Respectfully submitted,

Jack D. H. Hays
United States Attorney
For the District of Arizona

Michael A. Lacagnina
Assistant United State Attorney

Attorneys for Appellee

No. 16439 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GUY N. STAFFORD,

Plaintiff and Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE COUNTY OF LOS ANGELES, *et al.*,

Defendants and Appellees.

APPELLEES' BRIEF.

HAROLD W. KENNEDY,
County Counsel,

and

EDWARD A. NUGENT,
Deputy County Counsel,

1100 Hall of Records,
Los Angeles 12, California,

Attorneys for Defendants and Appellees.

FILED

JUN 15 1959

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Terminology	1
Introductory	2
I.	
Statement of pleadings and occurrences below.....	2
II.	
Question presented	4
III.	
Summary of argument.....	4
A. General	4
B. Amended complaint reviewed.....	5
IV.	
Plaintiff's state court litigation.....	8
V.	
The Federal District Court had no jurisdiction to review the actions of defendant, Superior Court in the premises stated in the amended complaint.....	10
A. Declaratory relief and conspiracy allegations.....	10
B. Civil rights	13
VI.	
The Federal District Court's power to enjoin California courts depends upon a jurisdictional base for the main action plus an exercise of its discretion in that regard.....	19
VII.	
The habeas corpus proceedings having been carried to the United States Supreme Court no longer fall within the jurisdictional ambit of the Federal District Court.....	19
VIII.	
Conclusion	21

TABLE OF AUTHORITIES CITED

CASES	PAGE
Agnew v. City of Compton, 239 F. 2d 226.....	13, 17
Baldwin v. Morgan, 251 F. 2d 780.....	18
Coburg Oil Co. v. Russell, 100 Cal. App. 2d 200, 223 P. 2d 305	8
Coburg Oil Co. v. Russell, 129 Cal. App. 2d 214, 276 P. 2d 637	9
Coburg Oil Co. v. Russell, 136 Cal. App. 2d 165, 288 P. 2d 305	9, 20
Condra v. Leslie & Clay Coal Co. (D. C. E. D., Ky., 1952).....	18
Davis v. Turner, 197 F. 2d 847.....	17
Drawdy Investment Company v. Leonard, 261 F. 2d 228.....	13
Geach v. Olsen, 211 F. 2d 682.....	20
Givens v. Moll, 177 F. 2d 765, cert. den. 339 U. S. 964.....	11
Griffin v. Griffin, 327 U. S. 220.....	16
Grubbs v. Slater, 144 Fed. Supp. 554.....	8, 13
Heller, Application of, 39 Fed. Supp. 310.....	11
Levy v. Sisson, 198 F. 2d 73.....	12
People ex rel. Dept. Pub. Works v. Ashby, 161 Cal. App. 2d 31, 3 L. Ed. 233.....	9, 10
Phelan v. Superior Court, 35 Cal. 2d 363, 217 P. 2d 951.....	13
Porter v. Benison, 180 F. 2d 523, cert. den. 340 U. S. 817.....	12
Sanders v. Howard Park Co., 86 Cal. App. 2d 721, 195 P. 2d 898	8
Schemaitis v. Reid, 193 F. 2d 119.....	20
Sexton v. Barry, 233 F. 2d 220.....	19
Shelley v. Kraemer, 334 U. S. 1.....	16
Smith v. Fourth National Bank of Tulsa, 141 F. 2d 294.....	12
358 U. S. 913, reh. 942.....	9, 20
Stafford v. Russell, 117 Cal. App. 2d 319, 255 P. 2d 872, cert. den. 346 U. S. 926.....	8
Stafford v. Russell, 128 Cal. App. 2d 794, 276 P. 2d 41.....	9
Stafford, In re, 160 Cal. App. 2d 110, 324 P. 2d 967, cert. den.	
Stinnet v. Mills, 259 F. 2d 272.....	18
Williams v. Tooke, 108 F. 2d 758.....	12

STATUTE

United States Code Annotated, Title 28, Sec. 2201 et seq.....	17
---	----

No. 16439

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GUY N. STAFFORD,

Plaintiff and Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE COUNTY OF LOS ANGELES, *et al.*,

Defendants and Appellees.

APPELLEES' BRIEF.

Terminology.

In this brief the defendants and appellees, Superior Court of the State of California, in and for the County of Los Angeles, and Peter J. Pitchess, as Sheriff of the County of Los Angeles, will hereinafter usually be referred to respectively as: "defendant Superior Court" and "defendant Sheriff," collectively as "appellees." Plaintiff and appellant, Guy N. Stafford, will usually be referred to as "plaintiff." The lower court and judge from whose judgment this appeal is prosecuted (Federal District Court, Southern District, Central Division per Judge Harrison), will usually be referred to as "court below" or "lower court." The transcript of record before this Court will be referred to as "record" and abbreviated as "[T. R. p.]." The first amended complaint [T. R. p. 32] will

be referred to as “amended complaint” and the original complaint in this action [T. R. p. 2] will be so termed. The numerous purported party defendants whom Stafford has requested the lower court to permit him to join in the Amended Complaint (which request has not been granted, see *infra* p. 3) will usually be referred to as the “additional defendants.” Plaintiff’s “Appellant’s Opening Brief” will usually be referred to as “opening brief” and abbreviated “[Applt’s. Op. Br. p.].” References to the record and to the opening brief will be in brackets.

Introductory.

This brief, after supplementing plaintiff’s statement of the proceedings below and stating the basic question, will summarize appellees’ argument, and then discuss the various causes of action in the Amended Complaint stating and applying the relevant principles of law.

I.

Statement of Pleadings and Occurrences Below.

Plaintiff has given the record history of the instant action from the filing of the original complaint down to the taking of his appeal from the lower court’s Judgment of Dismissal Without Prejudice of the action entered on March 12, 1959 [T. R. p. 73]. Prior to this a Judgment of Dismissal Without Prejudice of this action was filed on July 15, 1958 [T. R. p. 31]. At that time, the Complaint on file named only defendant Superior Court and Eugene W. Biscailuz (then Sheriff) as defendant Sheriff as parties [T. R. p. 2]. That Complaint consisted of three causes of action. The first two causes of action asking declaratory relief from a series of rulings and judgments of defendant Superior Court commencing with Los An-

geles Superior Court No. 478480 in the year 1946 down to and including denial of plaintiff's Petition for Habeas Corpus on May 5, 1958 [Complaint, Par. XXIV, T. R. p. 18]. The third cause of action asked an injunction against defendant Superior Court and defendant Sheriff to prevent the carrying out of a Judgment of Contempt [Complaint, Par. VI, T. R. p. 21]. It should be noted that following denial of the plaintiff's Petition for Habeas Corpus in the California courts, plaintiff's Petition for Writ of Certiorari to the Supreme Court of the United States was denied (see *infra* No. 7, p. 9).

The Amended Complaint was filed January 27, 1959 [T. R. p. 32], but nowhere in the record does it appear that permission was granted by the District Court for such filing. Appellees' motion to dismiss the amended complaint [T. R. p. 61] and the judgment of dismissal following the hearing on that motion does not constitute such judicial permission as the lower court's judgment dismisses the entire action [Judgment of Dismissal, T. R. p. 72]. No action was taken by the lower court directed expressly to plaintiff's motion to add the additional parties named in the amended complaint. The judgment appealed from is consistent with the earlier judgment at the time of the original Complaint for that judgment also dismisses the action [T. R. p. 31].

We point out these additions to plaintiff's statement of proceedings [Applt's. Op. Br. pp. 1-2] because they show that the amended complaint should be viewed without considering the additional defendants and causes of action against them since said defendants and causes of action were not properly before the lower court [Amended Complaint, T. R. p. 32, Causes of Action—Second, Third and Fourth].

II.

Question Presented.

At the hearing below on appellees' Motion to Dismiss the Amended Complaint did the Federal District Court have jurisdiction of the action?

We submit the answer to this question is "no" and that under no view, whether with or without the additional defendants, and causes of action directed against them does the Amended Complaint present an action within the jurisdiction of the lower court.

III.

Summary of Argument.

A. General.

The basic nature of the original Complaint and of the Amended Complaint remain the same despite the new and different causes of action now present.

Plaintiff's Amended Complaint ignores the settled limits of a Federal District Court's jurisdiction. The same is original and does not comprise reviewing the actions of state courts. If the federal questions which plaintiff speaks of existed, they were present in the numerous state court actions after the decisions rendered by defendant Superior Court which plaintiff contends were in violation of his federally given rights. To that extent all federal questions have been resolved by higher state court decisions. Review was then available by certiorari of all of defendant Superior Court's actions insofar as such actions violated federal rights. Plaintiff cannot now, by indirection reassert these concluded federal questions to an improper tribunal.

The courts of California in allowing plaintiff some thirteen years of litigation and at least ten reported appellate

decisions have more than complied with due process requirements as to equal protection. Plaintiff nowhere alleges or shows that he represents any class, group or race which is receiving from the courts of California other and different treatment from other classes, groups or races based on or because of such differences.

B. Amended Complaint Reviewed.

The key cause of action from a substantive standpoint is the first. In this First Cause of Action, plaintiff in 46 numbered paragraphs sets out in a mixture of allegations of fact, conclusions of law, opinion and inference a rough narrative of over a decade of litigation with private individuals and toward the end of said period with appellees and other state functionaries. During this time, as appears from the Amended Complaint, he has reiterated in an impressive number of actions contentions ruled adversely to him in the first years of this litigation. Defendant Superior Court, to prevent further imposition on its judicial processes, was compelled to first enjoin plaintiff from further fruitless litigation of said contentions and subsequently hold him in contempt for violation of the injunction. Declaratory relief is asked in that the Federal District Court is asked to review this mass of litigation and hold that defendant Superior Court has erroneously decided each and all of the questions presented by plaintiff.

The First Cause of Action is not a genuine cause of action for declaratory relief between bona fide contestants. The courts of California have no controversy or quarrel with plaintiff. Their decisions decide controversies and declare rights and duties. Their decisions may offend the unsuccessful litigant but he cannot predicate federal jurisdiction on the fact that questions of state law have been resolved against him.

The remaining five Causes of Action, each incorporate the First Cause of Action [Amended Complaint, Second Cause of Action, Par. I, T. R. p. 53; Third Cause of Action, Par. I, T. R. p. 55; Fourth Cause of Action, Par. I, T. R. pp. 55-56; Fifth Cause of Action, Par. I, T. R. p. 57; Sixth Cause of Action, Par. I, T. R. p. 57]. The Second Cause of Action simply takes certain of the state court proceedings alleged in the First Cause of Action and charges that certain of the additional defendants conspired to have achieved the decision rendered by defendant Superior Court in Los Angeles Superior Court No. 568668 and to so represent the facts and the law to defendant Superior Court as to cause it to deny due process of law to plaintiff. It concludes with an allegation that the conspiracy has been effective. The conspiracy allegations and those relating to federal rights are conclusionary in form and depend entirely upon proving the existence of the same by a review of the decisions of defendant Superior Court.

The Third Cause of Action simply adds to the Second a demand for additional money damages. It adds nothing legally speaking to the factual basis of the Amended Complaint and is totally insufficient to give a jurisdictional basis to this action.

The Fourth Cause of Action incorporates the Second Cause of Action and in so doing incorporates the paragraphs of the First Cause of Action detailing the various judicial decisions made by defendant Superior Court and other California courts. It states that the determinations made in three actions, Los Angeles Superior Court Nos. 478480, 516496 and 568668 were in excess of jurisdiction, in violation of constitutional inhibitions and void and that the parties to the Second Cause of Action should be restrained from asserting such determinations in any pro-

ceeding brought by plaintiff to enforce his property rights in the subject matter of those actions.

As in the case of the Second Cause of Action, this is the First Cause of Action in still other attire. To adjudicate it would again place the Court below in the position of reviewing the decisions of defendant Superior Court and the upper California courts who have considered the matter.

The Fifth Cause of Action asks an injunction against the judges of defendant Superior Court prohibiting them from committing plaintiff to jail pending a final determination of the instant action. Jurisdiction to issue the injunction sought is obviously predicated upon jurisdiction over the action and if that is lacking the jurisdictional question, *re*: the injunction, does not arise. We have argued that such is the case as to the preceding four causes of action and we shall similarly so argue as to the Sixth and final Cause of Action. Additionally, even granting jurisdiction existed over the action, the District Court would be within its rights under the circumstances of this case in refusing to issue said preliminary injunction.

The Sixth Cause of Action repeats the First Cause of Action and states plaintiff's conclusion that the contempt and *habeas corpus* decisions of defendant Superior Court and upper California courts were illegal and that therefore plaintiff is entitled to ask for a Writ of *Habeas Corpus* here. Not only is jurisdiction over this cause completely dependent on jurisdiction over the First Cause of Action, but further, the denial of certiorari by the Supreme Court of the United States concludes raising any federal issue here.

IV.

Plaintiff's State Court Litigation.

We do not burden this brief or the court with a lengthy recitation of the contentions made by plaintiff before the California courts over the years regarding the matters stated in the Amended Complaint but for the court's convenience we summarize chronologically the majority of such litigation. Of course, this court may take judicial notice of the appellate decisions listed below (*Grubbs v. Slater* [D. C. W. D., Ky., 1955], 144 Fed. Supp. 554, 562):

1. *Sanders v. Howard Park Co.*, 86 Cal. App. 2d 721, 195 P. 2d 898 (holds judgment in Los Angeles Superior Court No. 478480, valid).

2. *Coburg Oil Co. v. Russell*, 100 Cal. App. 2d 200, 223, P. 2d 305 (hearing denied California Supreme Court) (on appeal from judgment in Los Angeles Superior Court No. 516496, affirmed and judgment in Los Angeles Superior Court No. 478480 again held valid).

3. *Stafford v. Russell*, 117 Cal. App. 2d 319, 255 P. 2d 872 (hearing denied California Supreme Court), cert. den. 346 U. S. 926 (appeal from judgment in Los Angeles Superior Court No. 568668, holds judgments in Superior Court actions numbered 478480 and 516496 binding upon Stafford). The court said:

“In the present case plaintiff reiterates the allegations of the previous two actions and raises the same questions that were previously raised in the prior actions where the rulings were adverse to him. Such adverse rulings are binding upon plaintiff herein and need not further be considered for the reason that though he was not a nominal party to the prior actions

the Coburg Oil Company was, and plaintiff had a proprietary and financial interest in the judgment and controlled the Coburg Oil Company's conduct in the actions.

"[1] Therefore this rule is applicable: A person who is not a party to an action but who controls the action is bound by the judgment where he has a proprietary or financial interest in the judgment or in the determination of a question of fact or law with reference to the same subject matter or transaction. (*Dillard v. McKnight*, 34 Cal. 2d 209, 216 [8] [209 P. 2d 387, 11 A.L.R. 2d 835].)" (117 Cal. App. 2d 320.)

4. *Stafford v. Russell*, 128 Cal. App. 2d 794, 276 P. 2d 41 (hearing denied California Supreme Court) (holds judgments in above three actions binding upon plaintiff).

5. *Coburg Oil Co. v. Russell*, 129 Cal. App. 2d 214, 276 P. 2d 637 (to the same effect).

6. *Coburg Oil Co. v. Russell*, 136 Cal. App. 2d 165, 288 P. 2d 305 (re-affirms holdings in former cases).

7. *In re Stafford*, 160 Cal. App. 2d 110, 324 P. 2d 967, cert. den. 358 U. S. 913, reh. 942 (Writ of *Habeas Corpus* denied and validity of judgment in Los Angeles Superior Court No. 568668 enjoining plaintiff from claiming interest in property and judgment of contempt affirmed).

8. *People ex rel., Dept. Pub. Works v. Ashby* (plaintiff intervener), 161 Cal. App. 2d 31, P. 2d, cert. den. U. S., 3 L. Ed. 233 (appeal from orders growing out of plaintiff's attempt to intervene in condemnation proceeding denominated *People v. Ashby*, Los Angeles Superior Court No. 648612—appeal dismissed).

9. *People ex rel., Dept. Pub. Works v. Ashby* (Staford intervener), 161 Cal. App. 2d 33, 325 P. 2d 1009 (appeal from orders growing out of plaintiff's attempt to intervene in condemnation proceeding denominated *People v. Ashby*, Los Angeles Superior Court No. 648612—appeal dismissed).

10. *People ex rel., Dept. Pub. Works v. Ashby* (Coburg Oil Co. intervener), 161 Cal. App. 2d 34 (hearing denied California Supreme Court) (appeal from orders growing out of plaintiff's attempt to intervene in condemnation proceeding denominated *People v. Ashby*, Los Angeles Superior Court No. 648612—appeal dismissed).

An inspection of the California reports shows that all of the charges made in the Amended Complaint have been disposed of by the foregoing decisions. The same adds nothing except conclusionary conspiracy allegations and bald statements regarding the supposed effect of the actions of the California courts on plaintiff's rights.

V.

The Federal District Court Had No Jurisdiction to Review the Actions of Defendant Superior Court in the Premises Stated in the Amended Complaint.

A. Declaratory Relief and Conspiracy Allegations.

A request for redetermination and interpretation of a state court judgment (and of the proceedings leading thereto) amounts to nothing more than a request for review and to add the additional language that the state courts are contending for one interpretation of their proceedings and judgments and plaintiff for an interpretation that such proceedings and judgments are erroneous or void cannot modify or ameliorate the substance of plaintiff's demand so as to give the Federal District Court jurisdic-

tion under the Federal Declaratory Relief Act. And the conspiracy allegations do not give more substance to the Amended Complaint. In *Givens v. Moll* (C. A. 5th, 1949), 177 F. 2d 765 (rehearing denied), cert. den. 339 U. S. 964, plaintiff complained in the Federal Court that certain defendants conspired to obtain and obtained judgments in the state court in order to deprive plaintiff and others by state power of property without due process of law. The purpose of the scheme was alleged to be to defraud plaintiff and other heirs out of their rights in an estate. The Court of Appeals disposed of plaintiff's contentions regarding the state court judgments in the following language:

"If appellant were right, every case brought to judgment in a state court could be made the basis of a suit in the federal court upon the ground of a federal question by the mere allegation that the state court judgment was obtained in violation of due process. That this is not, it cannot be, the law, is as clear upon principle as it is upon authority. It is well settled that federal courts are not competent or authorized to entertain original suits to review state court action on the ground that a state court's judgment is erroneous. It is particularly well settled that the claim that a state court's judgment is erroneous raises no federal question on which the jurisdiction of federal courts can be based." (177 F. 2d 767.)

In *Application of Heller* (D. C. M. D. P. A., 1941), 39 Fed. Supp. 310, 311, the District Court said:

"* * * The specific charge is that fraud has been practiced upon her in the courts of the Commonwealth of Pennsylvania. This Court has no authority

to review as on appeal any procedure or action in the courts of this Commonwealth, and it will not assume jurisdiction where such is the purpose.” (39 Fed. Supp. 311.)

To the same effect was the decision by this Court in *Levy v. Sisson* (C. A. 9th, 1952), 198 F. 2d 73. See also *Porter v. Benison* (C. A. 10th, 1950), 180 F. 2d 523, 526, *cert. den.* 340 U. S. 817; *Smith v. Fourth National Bank of Tulsa* (C. C. A. 10th, 1944), 141 F. 2d 294, 295.

The necessity of reviewing federal questions arising in state court proceedings by petition or appeal to the Supreme Court of the United States rather than in the Federal District Court is pointed out in *Williams v. Tooke* (C. C. A. 5th, 1940), 108 F. 2d 758, 759 (rehearing denied). There a suit sought review of state court decisions relating to rights in land and oil leases on the grounds that the state court lacked jurisdiction to render its judgment and that the judgments made deprived plaintiff of property without due process of law and denied plaintiff equal protection of the law. The Federal District Court dismissed the action for want of jurisdiction and on appeal it was said by the Court of Appeals that:

“The jurisdiction of the District Court is strictly original. It has no jurisdiction to reverse or modify the judgment of a state court. The errors complained of could be reviewed only by the Supreme Court. *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362. It was the duty of the District Court to dismiss the suit. 28 U. S. C. A. §80.” (108 F. 2d 759.)

The fact that plaintiff alleges that the judgments of defendant Superior Court in certain actions were void does

not entitle him to the original jurisdiction of the federal courts. What plaintiff does not mention but is a matter for judicial notice is that (1) under California law a void judgment can be challenged by appeal (*Phelan v. Superior Court*, 35 Cal. 2d 363, 366, 217 P. 2d 951) and that (2) this challenge has been presented to the upper courts of California on numerous occasions and the validity of the judgments and their binding effect on plaintiff has been repeatedly affirmed. We refer the court to the cases listed under point IV, *supra*, pages 8-10, and in particular to decisions listed as numbers 1, 2 and 3.

The grounds on which the Amended Complaint attacks the state court judgments, indispensable party not joined, improper binding effect on plaintiff, etc., are each and all matters for local law, and the California courts are the arbiters thereof. Procedural due process does not require more than following the appropriate rules of the form, and this has clearly been done (*Drawdy Investment Company v. Leonard* [C. A. 5th, 1958], 261 F. 2d 228).

B. Civil Rights.

From plaintiff's opening brief it appears he looks to his Second Cause of Action as stating a claim under the civil rights act [Applt's. Op. Br. p. 13]. It is true as stated by this court in the case of *Agnew v. City of Compton* (C. A. 9th, 1956), 239 F. 2d 226 [cited Applt's. Op. Br. pp. 11, 13], that a complaint can be drawn so as to seek recovery under the Constitution and laws of the United States, but it is also true as appears from that case that the Complaint must state facts as well as conclusionary allegations. The case of *Grubbs v. Slater* (D. C. W. D., Ky., 1955), 144 Fed. Supp. 554, cited *supra*, page 8, is most apposite. In that case plaintiff filed a petition nam-

ing as defendants certain private individuals, private newspaper corporations together with the attorneys for said corporations, judges in prior civil actions between plaintiff and said corporations and the court clerk. The petition charged that in prior civil actions, pursuant to conspiracy, null and void judgments were entered against him. Plaintiff proposed to show how these individuals had conspired to cause the courts to deny him his rights under the law. The court discussed the allegations and the applicable law carefully and at considerable length. It pointed out that the corporation's attorneys' acts were not the acts of the state and that, therefore, no federal questions arose under the due process clause in that respect. It then showed that the state of the law conferred immunity on the judicial officers. It concluded by showing that the corporations were not clothed with state power and that, therefore, their alleged wrongful acts were private wrongs. Among the more pertinent language was the following:

"In the case of *Moffett v. Commerce Trust Company*, 8 Cir., 187 F. 2d 242, 248, the Court said:

"Plaintiff's allegations that the decisions of the various State courts in litigation in which she was involved were void or arbitrarily or willfully made merely expresses an opinion not uncommon among defeated litigants, and, as appears from the face of the complaint, not entertained by the State Supreme Courts which reviewed the judgments. The charge that the State Court judgments were intentionally and purposefully against plaintiff, aside from the fact that the language used would apply equally as well to the decision of any court, right or wrong, adds nothing to the force or effect of the complaint." (144 Fed. Supp. 561.)

“[1, 2] Federal Courts take judicial knowledge of the decisions of all Courts (State and Federal but not foreign) and of the facts that limit each decision. *Armstrong v. Alliance Trust Company*, 5 Cir., 126 F. 2d 164. Therefore, the Court takes judicial knowledge and notice of the cases in the Kentucky Court of Appeals. The first case is *Grubbs v. Slater, Ky.*, 266 S. W. 2d 85. The second case is that of *Grubbs v. Slater & Gilroy, Inc., Ky.*, 267 S. W. 2d 754.” (144 Fed. Supp. 562.)

“[5] It was said by Judge McAllister in *McShane v. Moldovan*, 6 Cir., 172 F. 2d 1016, referring with approval to the case of *Botonne v. Lindsley*, *supra*, that it was doubtful that a judge acting in his official capacity even in concert with officers of his court acts under color of state law in the trial of a case between private parties, thereby distinguishing *Botonne v. Lindsley* with *McShane v. Moldovan*, the latter being a case arising out of criminal prosecution and he continued to say that in a civil action where plaintiff claimed a deprivation of due process and equal protection of the law in a state trial court he had no just complaint where the case was appealed to the State Supreme Court and the judgment of the lower court is affirmed. That circumstance is true in the case at bar.” (144 Fed. Supp. 564.)

In substance the above case is analogous to ours. In both a conspiracy was charged and the wrongs alleged committed were supposedly improper state court decisions. There is an absence of specification in the Amended Complaint of any acts or facts on the part of the private individuals sought to be joined which impeded or impaired

state court justice. Those allegations attempting to make this facet of plaintiff's case show no more than that the parties concerned were involved in judicial proceedings and represented their own interests. There is nothing to show that prejudice, bias or denial of right occurred as to the plaintiff, save the fact that he has, by relitigating the same issues in a series of cases, compiled a heavy score of decisions against his position.

We submit the Civil Rights Act is not properly invoked by plaintiff, and is an attempt to give color to federal jurisdiction where the matters complained of are clearly within the province of the state.

We have no quarrel with the numerous cases cited by plaintiff in his opening brief, but we do not believe that they take away from or impair the authorities and principles stated herein. On the contrary, the very cases cited by plaintiff substantiate the views stated in this brief.

In particular, plaintiff relies on *Shelley v. Kraemer* (1948), 334 U. S. 1 [cited Applt's. Op. Br. p. 11]. This case involved the propriety of a state court judgment enforcing the racial provisions of restrictive covenants entered into by property owners. The state court judgment in effect gave state sanction to discrimination against Negroes on account of their race. Accordingly, such state action was in conflict with the equal protection and other clauses of the Federal Constitution. Such is not the case nor alleged to be the case here. The decision arose on certiorari. In our case, original review is sought in the Federal District Court, and there are no allegations going to the class effect of the state court action.

Griffin v. Griffin (1946), 327 U. S. 220 [cited Applt's. Op. Br. p. 11], holds that the jurisdictional basis of a

state court judgment can be re-examined when it is sought to give that judgment effect by suit in the federal court. The action involved the Full Faith and Credit clause of the Constitution. That clause is not involved in our case. No one is attempting to enforce these state court judgments in the present action.

Plaintiff apparently relies on *Agnew v. City of Compton* (C. A. 9th, 1956), 239 F. 2d 226. This case does not aid plaintiff. Despite the general statement therein that a complaint could be drawn under the Federal Civil Rights Act, the case points out that stating a common law cause of action for false arrest or false imprisonment does not bring the matter within federal jurisdiction unless there are further allegations that the purpose of the arrest was to discriminate between persons or classes of persons. The case points out that a general allegation that an arrest or other action is for the purpose of denying plaintiff his rights, privileges and immunities under the Constitution is not sufficient unless supported by the complaint as a whole. We urge the court that the complaint as a whole does not state facts supporting that sort of allegation in our case. The *Agnew* case is further restrictive in showing that a federal question must first be presented (*i.e.*, jurisdiction acquired) before the declaratory judgments act, 28 U. S. C. A., Section 2201 *et seq.* [relied on Applt's. Op. Br. pp. 3 and 9 as a jurisdictional basis] comes into play.

We note that those cases collected in his opening brief at pages 13 and 14 under point IV(B) are cited to support plaintiff's most palatable contention. Although the cases, broadly speaking, support the point there made, they do not support the application of that rule to the Amended Complaint. *Davis v. Turner* (C. A. 5th, 1952), 197 F.

2d 847, involves an improper arrest by a sheriff, not judicial action by a court. Further, there are factual allegations of physical violence causing physical damage as opposed here to the normal product of a judiciary, to wit: the decision of cases—decisions which have, in instances, been carried to the Supreme Court of the United States and certiorari there denied. *Condra v. Leslie & Clay Coal Co.* (D. C. E. D., Ky., 1952), was a case involving strikers and their right as a group to be protected from illegal company action. It is not in point here. *Baldwin v. Morgan* (C. A. 5th, 1958), 251 F. 2d 780, was a class action by Negroes and again, is not in point here. The opinion as reported in *Stinnet v. Mills* (C. A. 10th, 1958), 259 F. 2d 272, cryptically states the judgment is reversed as to costs without written opinion. Nothing is said regarding the case in chief.

The remainder of the cases cited by plaintiff do not, in our opinion, affect the merits of the jurisdictional question. We would point out that, although the merits of the Amended Complaint are not to be determined in this appeal, the merit of the same as to raising a federal question must be so determined since diversity of citizenship is admittedly not present. The existence of a federal question under the factual allegations of the Amended Complaint becomes a necessity if the lower court is to have had jurisdiction.

VI.

The Federal District Court's Power to Enjoin California Courts Depends Upon a Jurisdictional Base for the Main Action Plus an Exercise of Its Discretion in That Regard.

The heading explains itself in that either a preliminary or final injunction would be logically and legally impossible unless there were proceedings pending which the injunction would assist. Thus, unless the other causes of action conferred jurisdiction on the lower court, it would be futile for plaintiff to press for recognition of his Fifth Cause of Action. We have already discussed the substance of those other causes of action and stated our conclusion that they are insufficient for jurisdictional purposes.

Additionally, we point up the reluctance of federal courts to issue injunctions directed against state courts particularly where, as here, the entire subject matter of the federal action has been gone into time and time again in the state court. Principles of comity and economy show the felicitous nature of this rule. The case of *Sexton v. Barry* (C. A. 6th, 1956), 233 F. 2d 220, 224-226, supports this rationale.

VII.

The Habeas Corpus Proceedings Having Been Carried to United States Supreme Court No Longer Fall Within the Jurisdictional Ambit of the Federal District Court.

Judicial records open to and before this court show that Stafford has pursued his remedy for alleged invasion of his constitutional rights by virtue of the California contempt judgment and denial of his petition for Writ of *Habeas Corpus* up to the United States Supreme Court

which has denied him certiorari. If a proper federal question had appeared it may be assumed said court would have given Stafford relief. (See *In re Stafford*, 160 Cal. App. 2d 110, 324 P. 2d 967, cert. den. 358 U. S. 913, 942, and allied litigation in the Department of Public Works cases, listed *supra* as numbers 7, 8, 9, and 10, pages 9-10.

Further the Amended Complaint on its face shows that procedural due process was accorded plaintiff as to his petition for *habeas corpus* [Amended Complaint, Pars. XXXXI-XXXVI, T. R. pp. 50-52] and the supposed questions raised by prior proceedings were not within the scope of that proceeding (*In re Stafford*, referred to above; *Geach v. Olsen* [C. A. 7th, 1954], 211 F. 2d 682, 684).

Aside from the foregoing, the regularity of the contempt judgment and the denial of the petition for *habeas corpus* is beyond cavil based on the frequency of plaintiff's reiteration of the same contentions to California courts after receiving appropriate warning to desist (*Schemaitis v. Reid* [C. A. 7th, 1944], 193 F. 2d 119, 120). See opinion of Shinn for the California District Court of Appeals in *Coburg Oil Co. v. Russell*, 136 Cal. App. 2d 165, 168 (hearing denied California Supreme Court) where in it was said:

"We may observe, however, that it would seem to be in order for the trial courts to place Mr. Stafford under appropriate restraint and thus cause him to divert his energies into some profitable channels." (136 Cal. App. 2d 168.)

VIII.

Conclusion.

We submit that plaintiff has failed to allege sufficient facts in his Amended Complaint to confer jurisdiction on the lower court. The protracted litigation summarized by case citation, *supra*, pages 8-10, is evidence of the care and consideration plaintiff has received from the California courts. In an ordered society one need not agree with judicial decisions but one must be willing to abide by them. Plaintiff has misunderstood the extent of his civil rights as guaranteed by federal legislation when he assumes that they present here a basis for review of the considered action of California courts. Without disrespect to the sincerity of plaintiff's feelings, we suggest that he has had his day in court.

Respectfully submitted,

HAROLD W. KENNEDY,
County Counsel,

EDWARD A. NUGENT,
Deputy County Counsel,

By EDWARD A. NUGENT,
Deputy County Counsel,

Attorneys for Defendants and Appellees.

No. 16440 ✓

United States
Court of Appeals
for the Ninth Circuit

PATRIARCA MFG. INC., a corporation, DOME-
NICO PATRIARCA and DONALD A. CAM-
ERON, Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK and
PETER SOSNICK, a co-partnership doing
business as Melvin Sosnick Co., et al.,
Appellees.

Transcript of Record

In Two Volumes
VOLUME I
(Pages 1 to 197 inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

OCT 19 1959



No. 16440

United States
Court of Appeals
for the Ninth Circuit

PATRIARCA MFG. INC., a corporation, DOMENICO PATRIARCA and DONALD A. CAMERON,
Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK and PETER SOSNICK, a co-partnership doing business as Melvin Sosnick Co., et al.,
Appellees.

Transcript of Record

In Two Volumes
VOLUME I
(Pages 1 to 197 inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint:	
No. 35332	3
No. 35349	8
Answer to Complaint:	
No. 35332	13
No. 35349	20
Appeal:	
Bond For Costs on.....	48
Certificate of Clerk to Transcript of Record on	49
Designation of Record on (Appellants'-USCA)	195
Designation of Record on (Appellees'-USCA)	197
Notice of	47
Statement of Points on Which Appellants Intend to Rely on (USCA).....	194
Bond For Costs (Nos. 35332 and 35349).....	48
Certificate of Clerk to Transcript of Record (Nos. 35332 and 35349).....	49
Designation of Record on Appeal:	
Appellants' (USCA)	195
Appellees' (USCA)	197
Findings of Fact and Conclusions of Law (Nos. 35332 and 35349).....	39

Judgment (Nos. 35332 and 35349).....	46
Memorandum For Judgment (Nos. 35332 and 35349)	29
Names and Addresses of Attorneys.....	1
Notice of Additional Defenses, Defendants' (No. 35332)	26
Notice of Appeal (Nos. 35332 and 35349).....	47
Statement of Points on Which Appellants In- tend to Rely on Appeal (USCA).....	194
Stipulation re Answer:	
No. 35332	27
No. 35349	28
Transcript of Proceedings and Testimony (Nos. 35332 and 35349).....	51
Exhibits For Defendants:	
B—Letter Dated July 30, 1956, Jack E. Hursh to Eckoff & Slick, Att. Robert Slick	220
Admitted in Evidence.....	126
C—Copy of Letter Dated March 21, 1956, Jack E. Hursh to Rubinfeld Showcase Co.	221
Admitted in Evidence	83, 126
D - E - F - G—Pictures of Cigar Cabinet Taken at Golden State Rexall Phar- macy, Dec. 28, 1956.....	222-225
Admitted in Evidence.....	132

Transcript of Proceedings—(Continued):

Exhibits For Defendants—(Continued):

I-J—Invoice and Delivery Receipt, June, 1950, Royal Showcase Co. to Palm Liquors	226
Admitted in Evidence.....	153
K-L-M—Pictures of Cigar Cabinet Taken at Palm Liquor Store, Dec. 28, 1956	227-229
Admitted in Evidence.....	154
N—Italian Patent No. 459257 and Translation	231-243
Admitted in Evidence.....	185
O—R. N. Tamsen Patent No. 2,575,643....	244
Admitted in Evidence.....	185
P—T. P. Jensen Patent No. 1,452,242....	249
Admitted in Evidence.....	185
Q—A. P. Dulgeroff Patent No. 1,162,146..	253
Admitted in Evidence.....	185
R—W. R. Leibe & A. P. Bonnaffons Patent No. 977,318.....	258
Admitted in Evidence.....	185
S—I. Rosenberg Patent No. 543,657.....	262
Admitted in Evidence.....	185
T—W. Hoare Patent No. 542,475.....	265
Admitted in Evidence.....	187

Transcript of Proceedings—(Continued):
Exhibits For Plaintiffs:

1—Patent in Suit No. 2,735,739, D. Patriarca	199
Admitted in Evidence.....	52
2—Patent No. Des. 168,288, D. A. Cameron	203
Admitted in Evidence.....	52
6—Schedule Showing “Sales of Self-Server Cigar Humidors”.....	205
Admitted in Evidence.....	59
7—Questionnaire Dated Dec. 8, 1952 Addressed to Wolcott Hill Pharmacy....	207
Admitted in Evidence.....	61
8—Report to Self-Server Distributors and Cigar Manufacturers	208
Admitted in Evidence.....	62
9—Letters Received by Patriarca Store Fixtures Inc. re Self-Server.....	209-212
Admitted in Evidence.....	63
12—List of Parties Notified of Infringement of Patent.....	213
Admitted in Evidence.....	71
15—Letter dated April 10, 1956, Sidney R. Rose to Jack E. Hursh, Letter dated Feb. 3, 1956, Elliot A. Salter to Mellin, Hanscom & Hursh and Copy of Letter dated Jan. 18, 1956, Sidney R. Rose to Elliot Salter	214-217
Admitted in Evidence.....	93

Transcript of Proceedings—(Continued):

Exhibits For Plaintiffs—(Continued):

16—Self-Server Cigar Case Record-Unit & Dollar Value, June 3, 1953-Nov. 30, 1956	218
Admitted in Evidence.....	98

17—Comparative Value of Cigars Deliv- ered to Patriarca Purchasers (1955 For 90 Days).....	219
Admitted in Evidence.....	100

Opening Statement on Behalf of Plaintiffs..	51
---	----

Witnesses For Defendants:

Cohen, Henry

—direct	140
—cross	145
—redirect	147

Davincenzi, Claude L.

—direct	127
—cross	135

Lippincot, Donald

—direct	167
—cross	187

Sosnick, Marvin

—direct	161
—cross	164

Sosnick, Melvin

—direct	158
---------------	-----

Transcript of Proceedings—(Continued):

Witnesses For Defendants—(Continued):

Stelling, Harold

—direct	149
—cross	154
—redirect	157

Witnesses For Plaintiffs:

Glaser, Marcus

—direct	95
—cross	107

Delaney, Robert J.

—direct	123
—cross	124
—redirect	125

Patriarca, Domenico

—direct	53
—cross	72
—redirect	93

Sosnick, Marvin

—direct	125
---------------	-----

NAMES AND ADDRESSES OF ATTORNEYS

MELLIN, HANSCOM AND HURSH,
JACK E. HURSH,

391 Sutter Street,
San Francisco, California,

Attorneys for Appellants.

ECKHOFF AND SLICK,
1905 Mills Tower,
San Francisco, California,

EDWARD B. GREGG,
410 Mills Building,
San Francisco, California,

DONALD F. FARBSTAIN,
785 Market Street,
San Francisco, California,
Attorneys for Appelles.



In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 35332

PATRIARCA MFG., INC., a corporation, DOME-
NICO PATRIARCA, an individual, and DON-
ALD A. CAMERON, an individual,
Plaintiffs,

vs.

MELVIN SOSNICK, MARVIN SOSNICK, and
PETER SOSNICK, a copartnership doing
business as MELVIN SOSNICK CO., and
MELVIN SOSNICK, MARVIN SOSNICK
and PETER SOSNICK, individuals,
Defendants.

AMENDED COMPLAINT

Comes now Patriarca Mfg. Inc., a corporation,
Domenico Patriarca, an individual, and Donald A.
Cameron, an individual, and for cause of action
against the defendants, Melvin Sosnick Co., a co-
partnership, and Melvin Sosnick, Marvin Sosnick,
and Peter Sosnick, individuals, allege:

I.

That plaintiff, Patriarca Mfg., Inc., is a corpora-
tion duly organized and existing under and by vir-
tue of the laws of the State of Rhode Island, and
has a principal place of business in the City of
Providence, State of Rhode Island; that plaintiffs,

Domenico Patriarca and Donald A. Cameron, are individuals and residents of the City of Cranston, State of Rhode Island.

II.

That plaintiffs are informed and believe and on information and belief allege that defendant, Melvin Sosnick Co., is a copartnership consisting of Melvin Sosnick, Marvin Sosnick and Peter Sosnick, and has its principal place of business in the City and County of San Francisco, State of California; within the jurisdiction of this Court.

III.

That plaintiffs are informed and believe and on information and belief allege that defendants, Melvin Sosnick, Marvin Sosnick and Peter Sosnick are individuals, citizens of the State of California, and have a place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

IV.

That this Court has jurisdiction of this action because the same arises under the Patent Laws of the United States.

V.

That on December 2, 1952, Design Letters Patent of the United States No. Des. 168,288, entitled "Self-Service Display Container", was legally and duly issued to Donald A. Cameron and that by as-

signment of said Design Letters Patent, plaintiff, Domenico Patriarca, is now and has been, at all times mentioned herein, the owner of an undivided one-half interest in, to and under said Design Letters Patent of the United States; that plaintiffs, Domenico Patriarca and Donald A. Cameron, are now and have been, at all times mentioned herein, the owners of the entire interest in, to and under said Design Letters Patent of the United States; that plaintiff, Patriarca Mfg., Inc., by virtue of an agreement in writing, became the exclusive licensee to manufacture, use and sell the invention of said Design Letters Patent No. Des. 168,288.

VI.

That on February 21, 1956, Letters Patent of the United States No. 2,735,739, entitled "Self-Server Display Cabinet", was legally and duly issued to Domenico Patriarca and that said Domenico Patriarca is the owner of said Letters Patent; that plaintiff, Patriarca Mfg., Inc., by an agreement in writing became the exclusive licensee to manufacture, use and sell the invention of said Letters Patent of the United States No. 2,735,739.

VII.

That plaintiffs allege that prior to the filing of the complaint herein and within six (6) years last within the jurisdiction of this Court, at San Francisco, California, and elsewhere, the said defendants, and each of them, infringed said Design Let-

ters Patent No. Des. 168,288 and Letters Patent No. 2,735,739 by manufacturing and selling and offering to manufacture and sell or using or causing to be used devices which embody the inventions claimed in said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739.

VIII.

That plaintiffs are informed and believe and on information and belief allege that the defendants, and each of them, have derived unlawful gains and profits from the said infringing acts which plaintiffs would otherwise have received but for such infringement by defendants, and said infringement by defendants has caused plaintiffs large damages and irreparable injury and will continue so to do unless enjoined by this Court.

IX.

That defendants, and each of them, have had direct notice of said patents and were notified to desist from infringement thereof, but refused so to do and continue their said infringement.

X.

That plaintiffs are informed and believe and on information and belief allege that the infringement of plaintiffs' said patents by said defendants was done knowingly and in wanton and deliberate disregard of plaintiffs' rights thereunder.

XI.

That plaintiffs have been damaged by the infringing acts of defendants in an amount of at least Ten Thousand Dollars (\$10,000.00).

Wherefore Plaintiffs Pray:

1. For a preliminary and a permanent injunction restraining the defendants, and each of them, their agents, servants, employees and those in privity with them, or any of them, from directly or indirectly making or causing to be made, selling or causing to be sold, using or causing to be used, or offering for sale the devices coming within the scope of Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739, and from infringing upon and violating the plaintiffs' rights thereunder in any manner whatsoever.

2. For an accounting of damages from the defendants for the infringement of said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739 and that said damages be trebled in view of the wanton and deliberate character of the infringement.

3. That plaintiffs have judgment against the defendants for reasonable attorneys' fees incurred by plaintiffs in this action.

4. That plaintiffs have judgment against the defendants for plaintiffs' costs and disbursements herein and for such other and different relief as

this Court may deem meet and proper in the premises.

PATRIARCA MFG., INC.,
DOMENICO PATRIARCA,
DONALD A. CAMERON.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed September 4, 1956.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 35349

PATRIARCA MFG., INC., a corporation, DOME-
NICO PATRIARCA, an individual, and DON-
ALD A. CAMERON, an individual,
Plaintiffs,

vs.

ALFRED AUSTRUY, an individual, FIRST
DOE, SECOND DOE, X AND Z COM-
PANY, a corporation, DOE AND ROE, a
copartnership, and BLACK AND WHITE
COMPANY, a copartnership,
Defendants.

AMENDED COMPLAINT

Comes now Patriarca Mfg., Inc., a corporation,
Domenico Patriarca, an individual, and Donald A.

Cameron, an individual, and for cause of action against the defendants above named, allege:

I.

That plaintiff, Patriarca Mfg., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Rhode Island, and has a principal place of business in the City of Providence, State of Rhode Island; that plaintiffs Domenico Patriarca and Donald A. Cameron, are individuals and residents of the City of Cranston, State of Rhode Island.

II.

That plaintiffs are informed and believe and on information and belief allege that defendant, Alfred Austruy, an individual, is a citizen of the State of California, and has a place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

III.

That the defendants, First Doe, Second Doe, X and Z Company, a corporation, Doe and Roe, a copartnership, and Black and White Company, a copartnership, are designated herein by fictitious names for the reason that their true names are unknown to plaintiffs, and plaintiffs will, upon ascertaining their true names or the true names of any of them, substitute the same for said fictitious names by proper amendment or amendments to the complaint.

IV.

That this Court has jurisdiction of this action because the same arises under the Patent Laws of the United States.

V.

That on December 2, 1952, Design Letters Patent of the United States No. Des. 168,288, entitled "Self-Service Display Container", was legally and duly issued to Donald A. Cameron and that by assignment of said Design Letters Patent, plaintiff, Domenico Patriarca, is now and has been, at all times mentioned herein, the owner of an undivided one-half interest in, to and under said Design Letters Patent of the United States; that plaintiffs, Domenico Patriarca and Donald A. Cameron, are now and have been, at all times mentioned herein, the owners of the entire interest in, to and under said Design Letters Patent of the United States; that plaintiff, Patriarca Mfg., Inc., by virtue of an agreement in writing, became the exclusive licensee to manufacture, use and sell the invention of said Design Letters Patent No. Des. 168,288.

VI.

That on February 21, 1956, Letters Patent of the United States No. 2,735,739, entitled "Self-Server Display Cabinet", was legally and duly issued to Domenico Patriarca and that said Domenico Patriarca is the owner of said Letters Patent; that plaintiff, Patriarca Mfg., Inc., by an agree-

ment in writing, became the exclusive licensee to manufacture, use and sell the invention of said Letters Patent of the United States No. 2,735,739.

VII.

That plaintiffs allege that prior to the filing of the complaint herein and within six (6) years last past within the jurisdiction of this Court at San Francisco, California, and elsewhere, the said defendants infringed said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739 by using or causing to be used devices which embody the inventions claimed in said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739.

VIII.

That plaintiffs are informed and believe and on information and belief allege that the defendants have derived unlawful gains and profits from the said infringing acts which plaintiffs would otherwise have received but for such infringement by defendants, and said infringement by defendants has caused plaintiffs large damages and irreparable injury and will continue so to do unless enjoined by this Court.

IX.

That defendants have had direct notice of said patents and were notified to desist from infringement thereof, but refused so to do and continue their said infringement.

X.

That plaintiffs are informed and believe and on information and belief allege that the infringement of plaintiffs' said patents by said defendants was done knowingly and in wanton and deliberate disregard of plaintiffs' rights thereunder.

XI.

That plaintiffs have been damaged by the infringing acts of defendants in an amount unknown by plaintiffs, but plaintiffs ask leave to amend this Amended Complaint when the amount of damage has been determined.

Wherefore Plaintiffs Pray:

1. For a preliminary and a permanent injunction restraining the defendants, and each of them, their agents, servants, employees and those in privity with them, or any of them, from directly or indirectly using or causing to be used, the devices coming within the scope of Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739, and from infringing upon and violating the plaintiffs' rights thereunder in any manner whatsoever.

2. For an accounting of damages from the defendants for the infringement of said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739, and that said damages be trebled in view of the wanton and deliberate character of the infringement.

3. That plaintiffs have judgment against the defendants for reasonable attorneys' fees incurred by plaintiffs in this action.

4. That plaintiffs have judgment against the defendants for plaintiffs' costs and disbursements herein and for such other and different relief as this Court may deem meet and proper in the premises.

PATRIARCA MFG., INC.,
DOMENICO PATRIARCA,
DONALD A. CAMERON.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed September 4, 1956.

[Title of District Court and Cause No. 35332.]

ANSWER

I.

Answering paragraph 1 of the complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

II.

Answering paragraph II of the complaint, defendant denies that Melvin Sosnick Company is a copartnership consisting of Melvin Sosnick, Marvin

Sosnick and Peter Sosnick, but does admit that Melvin Sosnick Co. is a copartnership consisting of Melvin Sosnick, Marvin Sosnick, Peter Sosnick, Celia Sosnick, and Eugene Sosnick, and admits that said Melvin Sosnick Co. has its principal place of business in the City and County of San Francisco, State of California.

III.

Answering paragraph 3 of the complaint, defendant admits the allegation therein.

IV.

Defendant admits that this court has jurisdiction of this action insofar as it arises under the Patent Laws of the United States.

V.

Answering paragraph V of the complaint, defendant admits that on December 2, 1952, Design Letters Patent of the United States, No. 168,288, issued to D. A. Cameron, but denies that said patent was legally and duly issued and, further, answers that it is without knowledge or information sufficient to form a belief as to the allegation of ownership of said Design Patent.

VI.

Answering paragraph VI, defendant admits that on February 21, 1956, Letters Patent of the United States No. 2,735,739, issued to Domenico Patriarca, but denies that said patent was legally and duly

issued and, further, answers that it is without knowledge or information sufficient to form a belief as to the allegation of ownership of said patent.

VII.

Answering paragraph VII of the complaint, defendant alleges that it has not infringed the patents in suit, nor either of them, and is not liable for infringement thereof, and that said patents are not enforceable against him. As a further answer, defendant states that plaintiff has not designated wherein defendant is alleged to have infringed either of the mentioned patents purportedly owned by plaintiff.

VIII.

Answering paragraph VIII of the complaint, defendant denies each and every allegation therein.

IX.

Answering paragraph IX of the complaint, the defendants admit that notice of infringement has been received from the plaintiff, but denies that defendant has ever infringed said patents.

X.

Answering paragraph X of the complaint, the defendants deny each and every allegation therein.

XI.

Answering paragraph XI of the complaint, defendant denies each and every allegation contained therein.

XII.

Defendant alleges that each of the claims of the patents in suit is invalid and wholly void on each and every one of the following grounds:

(a) United States Letters Patent:

984,006 Kade
2,544,975 Berger
2,432,736 Elkins
2,118,213 Malott
1,721,132 Orthwine
1,782,819 Hansen
1,934,834 Voigt
2,503,419 Secunde
542,475 Hoare
2,430,124 Johnson
2,067,118 Case
635,191 Sanger
1,452,242 Jensen
1,106,543 Burnham et al.
2,303,098 Waldo.
D-111,868 Tyler
D-145,834 Chase
D-154,674 Gochenour, Jr.
2,056,311 Pavlick.

British Letters Patent: 525,916/40 Sleigh.

Italian Letters Patent: 459,257/50 Taina.

Publication: Tyler, "Welded Steel Commercial Refrigerators", copyright 1948, page 38, Model R8X.

Prior Public Uses and Sales: By Rubinfeld Showcase Co., Los Angeles, California.

Defendant is continuing an investigation of prior patents, prior publications and prior public uses and sales and prays leave to amend its answer to include additional defenses when the same are ascertained.

(b) The alleged inventions and each of them were patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of the applications for patents in the United States. The list of patents, publications and prior public uses and sales in paragraph XII(a), above, is incorporated herein by reference.

(c) Each of the applicants abandoned his alleged invention.

(d) The alleged invention and each of them were described in a patent or patents granted on an application for patent by another filed in the United States before the alleged invention thereof by the applicants for patents. The list of patents in paragraph X(a), above, is incorporated herein by reference.

(e) Neither of the applicants did himself invent the subject matter sought to be patented.

(f) As to each of the patents, the invention therein was made before the applicant's invention by another who had not abandoned, suppressed, or concealed it. The list of patents, publications and prior public uses in paragraph XII(a), above, is incorporated herein by reference.

(g) The differences between the subject matter of the alleged inventions patented and the prior art are such that the subject matter as a whole would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art to which such subject matter pertains.

XIII.

As a further defense, defendant alleges that this suit is not a bona fide attempt to enforce patents under the Patent Laws of the United States, but is a frivolous and vexacious suit brought only to harrass the defendant and its customers and to damage the reputation and business of the defendant.

XIV.

Defendants are informed and believe and therefore on such information and belief, allege, that the patents in suit, and each of them, are invalid and void because the claims thereof are not patentably distinct from each other.

XV.

Defendant further alleges upon information and belief that said patents are unenforceable on the grounds of misuse of the patent grant. Plaintiff is illegally attempting to control the sale of an unpatented commodity which is in the public domain, by means of said patents, thereby rendering said patents unenforceable.

XVI.

Defendant further alleges upon information and belief that said patents are unenforceable and invalid on the grounds of double patenting. Plaintiff has obtained two patents covering identical subject matter.

XVII.

Defendant pleads any other facts or acts made a defense under Title 35, U. S. Code.

Wherefore, Defendant Prays:

(A) That the complaint herein be dismissed with prejudice;

(B) That costs be awarded to the defendant and against the plaintiff;

(C) That attorneys' fees be awarded to the defendant to be paid by the plaintiff;

(D) Such other and further relief as to the Court may be deemed just.

Signed at: San Francisco, California. Dated:
April 19, 1956.

DONALD F. FARBSTAIN,
ECKHOFF AND SLICK,
/s/ By ROBERT G. SLICK,
One of the Attorneys for
Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause No. 35349.]

ANSWER

I.

Answering paragraph I of the complaint, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

II.

Answering paragraph II of the complaint, defendants admit the same.

III.

Answering paragraph III of the complaint, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

IV.

Defendant admits that this court has jurisdiction of this action insofar as it arises under the Patent Laws of the United States.

V.

Answering paragraph V of the complaint, defendant admits that on December 2, 1952, Design Letters Patent of the United States, No. 168,288, issued to D. A. Cameron, but denies that said patent was legally and duly issued and, further, answers that it is without knowledge or information

sufficient to form a belief as to the allegation of ownership of said Design Patent.

VI.

Answering paragraph VI, defendant admits that on February 21, 1956, Letters Patent of the United States, No. 2,735,739, issued to Domenico Patriarca, but denies that said patent was legally and duly issued and, further, answers that it is without knowledge or information sufficient to form a belief as to the allegation of ownership of said patent.

VII.

Answering paragraph VII of the complaint, defendant alleges that it has not infringed the patents in suit, nor either of them, and is not liable for infringement thereof, and that said patents are not enforceable against him. As a further answer, defendant states that plaintiff has not designated wherein defendant is alleged to have infringed either of the mentioned patents purportedly owned by plaintiff.

VIII.

Answering paragraph VIII of the complaint, defendant denies each and every allegation therein.

IX.

Answering paragraph IX of the complaint, the defendants admit that notice of infringement has been received from the plaintiff, but denies that defendant has ever infringed said patents.

X.

Answering paragraph X of the complaint, the defendants deny each and every allegation therein.

XI.

Answering paragraph XI of the complaint, defendant denies each and every allegation contained therein.

XII.

Defendant alleges that each of the claims of the patents in suit is invalid and wholly void on each and every one of the following grounds:

(a) United States Letters Patent:

984,006 Kade
2,544,975 Berger
2,432,736 Elkins
2,118,213 Malott
1,721,132 Orthwine
1,782,819 Hansen
1,934,834 Voigt
2,503,419 Secunde
542,475 Hoare
2,430,124 Johnson
2,067,118 Case
635,191 Sanger
1,452,242 Jensen
1,106,543 Burnham et al.
2,303,098 Waldo.
D-111,868 Tyler
D-145,834 Chase
D-154,674 Gochenour, Jr.
2,056,311 Pavlick.

British Letters Patent: 525,916/40 Sleigh.

Italian Letters Patent: 459,257/50 Taina.

Publication: Tyler, "Welded Steel Commercial Refrigerators", copyright 1948, page 38, Model R8X.

Prior Public Uses and Sales: By Rubinfeld Showcase Co., Los Angeles, California.

Defendant is continuing an investigation of prior patents, prior publications and prior public uses and sales and prays leave to amend its answer to include additional defenses when the same are ascertained.

(b) The alleged inventions and each of them were patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of the applications for patents in the United States. The list of patents, publications, and prior public uses and sales in paragraph XII(a), above, is incorporated herein by reference.

(c) Each of the applicants abandoned his alleged invention.

(d) The alleged inventions and each of them were described in a patent or patents granted on an application for patent by another filed in the United States before the alleged invention thereof by the applicants for patents. The list of patents in paragraph X(a), above, is incorporated herein by reference.

(e) Neither of the applicants did himself invent the subject matter sought to be patented.

(f) As to each of the patents, the invention therein was made before the applicant's invention by another who had not abandoned, suppressed, or concealed it. The list of patents, publications, and prior public uses in paragraph XII(a), above, is incorporated herein by reference.

(g) The differences between the subject matter of the alleged inventions patented and the prior art are such that the subject matter as a whole would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art to which such subject matter pertains.

XIII.

As a further defense, defendant alleges that this suit is not a bona fide attempt to enforce patents under the Patent Laws of the United States, but is a frivolous and vexacious suit brought only to harrass the defendant and its customers and to damage the reputation and business of the defendant.

XIV.

Defendants are informed and believe and therefore on such information and belief, allege, that the patents in suit, and each of them, are invalid and void because the claims thereof are not patentably distinct from each other.

XV.

Defendant further alleges upon information and belief that said patents are unenforceable on the grounds of misuse of the patent grant. Plaintiff is illegally attempting to control the sale of an unpatented commodity which is in the public domain, by means of said patents, thereby rendering said patents unenforceable.

XVI.

Defendant further alleges upon information and belief that said patents are unenforceable and invalid on the grounds of double patenting. Plaintiff has obtained two patents covering identical subject matter.

XVII.

Defendant pleads any other facts or acts made a defense under Title 35, U. S. Code.

Wherefore, Defendant Prays:

(a) That the complaint herein be dismissed with prejudice.

(b) That costs be awarded to the defendant and against the plaintiff;

(c) That attorneys' fees be awarded to the defendant to be paid by the plaintiff;

(d) Such other and further relief as to the Court may be deemed just.

Signed at: San Francisco, California. Dated
April 19, 1956.

DONALD F. FARBSTAIN,
ECKHOFF AND SLICK,
/s/ By ROBERT G. SLICK,
One of the Attorneys for
Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause No. 35332.]

DEFENDANT'S NOTICE OF ADDITIONAL DEFENSES

Defendant gives to plaintiff the following notice
of additional defenses pursuant to U. S. Code, Title
35, Section 282.

In addition to the matters pleaded in the Answer
as invalidating the patents in suit, defendant will
rely upon the following:

United States Patents—

Des. 51-128	Willson	August 7, 1917
Des. 119,508	Waddell	March 19, 1940
Des. 122,189	Vaughn	August 27, 1940
543,657	Rosenberg	July 30, 1895
615,438	Driggs	December 6, 1898
977,318	Leibe et al.	November 29, 1910

1,162,140	Dulgeroff	November 30, 1915
1,205,040	Skall	November 14, 1916
1,431,371	Chapman	October 10, 1922
1,504,747	DeWitt	August 12, 1924
1,617,799	Emanuel et al.	February 15, 1927
1,713,620	Pauk	May 21, 1929
2,575,643	Tamsen	November 20, 1951

Prior Uses and Sales—

American Showcase and Fixture Co., Los Angeles, California.

Dated at San Francisco, California, August 1, 1956.

DONALD F. FARBSTAIN,
ECKHOFF AND SLICK,
/s/ By ROBERT G. SLICK,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause No. 35332.]

STIPULATION RE ANSWER

It is hereby stipulated, by and between the parties hereto, through their respective counsel, that defendants' answer on file herein to the original complaint may stand as and for the answer to the Amended Complaint on file herein.

Dated: September 7th, 1956.

MELLIN, HANSCOM & HURSH,
/s/ JACK E. HURSH,
Attorneys for Plaintiffs.
/s/ ROBERT G. SLICK,
Attorney for Defendants.

So Ordered:

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 10, 1956.

[Title of District Court and Cause No. 35349.]

STIPULATION RE ANSWER

It is hereby stipulated, by and between the parties hereto, through their respective counsel, that defendants' answer on file herein to the original complaint may stand as and for the answer to the Amended Complaint on file herein.

Dated: September 7th, 1956.

MELLIN, HANSCOM & HURSH,
/s/ JACK E. HURSH,
Attorneys for Plaintiffs.
/s/ ROBERT G. SLICK,
Attorney for Defendants.

So Ordered:

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 10, 1956.

In the United States District Court, Northern
District of California, Southern Division

No. 35332

PATRIARCA MFG., INC., a corporation, et al.,
Plaintiffs,

vs.

MELVIN SOSNICK, et al., Defendants.

No. 35349

PATRIARCA MFG., INC., a corporation,
Plaintiff,

vs.

ALFRED AUSTRUY, an individual, et al.,
Defendants.

MEMORANDUM FOR JUDGMENT

Plaintiff owns a design patent (U. S. No. Des. 168,288, the Cameron) and a utility patent (U. S. No. 2,735,739, the Patriarca) covering a self-service cigar showcase; defendant Sosnick has sold a similar cigar showcase which is alleged to infringe plaintiff's patents, and defendant Austruy has made use of a similar cigar showcase which is alleged to infringe plaintiff's patents. The two cases have been consolidated for trial and judgment by stipulation in open court. Defendants set up various defenses including lack of invention, anticipation in the prior art, and no infringement.

Considering first the validity of the utility patent, the Patriarca, it is found that every physical element of the device is anticipated by the prior art. The elements of the Patriarca showcase are described in claims 3 and 4 of the utility patent (which are the sole claims of the patent relied upon here by the plaintiff), somewhat as follows:

The display cabinet for cigars includes a base, side walls, a rear wall, a top, a lower front wall, and an upper front opening; the upper front opening is covered with sliding glass doors which slant outward from top to bottom, permitting a retail customer to slide back the glass doors and serve himself from the selection of cigars displayed inside. The cigars are displayed in boxes which are placed on a series of wooden steps behind the glass doors; the wooden steps also serve as a partition between the cigars displayed to the public and the back portion of the cabinet which houses storage space for the merchant's stock of cigars, as well as a humidifier. The wooden step partition is perforated, permitting the humidified air to circulate among the cigars displayed as well as those stored behind the perforated partition. The rear wall includes sliding doors for access to the storage area and humidifier. The humidifier is elevated above the floor of the cabinet on the theory that better circulation of humidified air is obtained than if the humidifier were resting on the base or floor of the cabinet.

Two photographs, defendant's exhibits "K" and "M", which are hereby incorporated in this Memo-

randum for Judgment, depict a cigar showcase that was sold in San Francisco by the Royal Showcase Company, a manufacturer other than the plaintiff, more than a year before application was made for the Patriarca patent. Referring to that example of the prior art it can readily be seen that it includes a base, side walls, a rear wall, a top, a lower front wall, and an upper front opening covered by sliding glass doors which slant outward from top to bottom. The Royal cigar case also includes a series of wooden steps for displaying cigar boxes, a storage space behind the wooden steps with access at the rear through sliding doors, and a humidifier.

The wooden step partition is not perforated in this particular cigar showcase, but expert testimony produced by the defendant revealed that it has been common practice in the industry to ventilate the risers of the steps in that general type of showcase for many years prior to the Patriarca patent. That testimony was to the effect that the risers had been ventilated by constructing them of grooved or perforated wood or masonite, or expanded metal which would provide a grillwork for ventilation. Furthermore, during the course of the prosecution of the Patriarca Patent, the patent examiner rejected various claims of the inventor on the ground that "The provision of perforations where desired is an obvious expedient * * *"

The mere fact that plaintiff's device makes use of a humidifier cannot be relied upon to prove invention, because, as the evidence revealed, and as the patent examiner ruled, "the combination of a

display casing and a humidifying unit is old * * *

The Royal cigar case, too, made use of a humidifier that rested on the floor or base of the storage area. It is the raising of the humidifier off the floor of the storage area in the Patriarca device that is claimed to constitute invention. Plaintiff produced some evidence that the type of humidifier used in its showcase, a forced draft unit, functioned better when it was raised off the floor of the showcase. Defendants, on the other hand, produced expert testimony that the type of humidifier used in the accused device, a convection humidifier, functioned better when it was resting on the floor of the showcase rather than when it was raised some distance above the floor.

Therefore it is clear that every physical element of the Patriarca device was anticipated in similar showcases that were in common use in the industry, and the patent is relegated to the status of a "combination patent."

Combination patents are now judged by a more severe test than formerly, as shown by the discussion of the Court of Appeals for this circuit in *Oriental Foods, Inc. v. Chun King Sales, Inc.*, 244 F. 2d 909, 912 (9 Cir. 1957), quoting from the landmark case of *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 71 S.Ct. 127, 129:

"Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to

add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men."

The Court of Appeals also adopted the following quotation from *Consolidated Trimming Corp. v. London*, 239 F. 2d 33, 36 (D.C. Cir. 1957): "A mere advance in efficiency and utility is not enough to convert a non-inventive aggregation into a patentable combination." To the same effect see *Kwikset Locks v. Hilgren*, 210 F. 2d 483 (9 Cir. 1954).

Testing the validity of the Patriarca patent by those standards, this Court is brought inevitably to the conclusion that the Patriarca device constitutes an advance in efficiency and utility, but that the mere raising of the humidifier above the floor of the cabinet did not require the exercise of inventive talent beyond the powers of the ordinary skilled artisan in the field of humidified showcases.

Therefore it is the opinion and conclusion of this Court that the Patriarca patent is invalid for want of invention, and because it was anticipated in the prior art.

Considering now the Cameron design patent, this Court must test the validity of that patent claim by the same standards as are applied to a mechanical or utility patent. In discussing the standards

to be applied to design patents the Court of Appeals for this circuit said in *Majestic, etc. Co. v. Westinghouse, etc. Co.*, 276 Fed. 676, 678, (9 Cir. 1921):

“The result obtained must not only be new, as in utility patents, but it must be also original, * * * and, furthermore, it must be ornamental. This means it must possess the elements of beauty and attractiveness; and in all this there must be invention of design, which reaches beyond the exercise of mere mechanical skill.”

It is also important to remember in connection with the Cameron design patent that its validity cannot be bolstered or aided by a consideration of any functional improvements or advances claimed in the Patriarca mechanical patent. This rule was applied in *Laskowitz v. Marie Designer, Inc.*, 119 F. Supp. 541, 545, (S.D.Cal. 1954): “But differences in function and in methods of attaining the function, important though they might be in a different type of patent, have no significance in a design patent.” And at page 549: “Utility does not count in a design patent.” See also *Rowley v. Tresenberg*, 37 F. Supp. 90 (E.D.N.Y.) *aff’d*. 123 F. 2d 844 (2 Cir.), to the effect that in considering the question of infringement of a design patent, functional features are excluded.

It is simply the appearance of the object when it is viewed as a whole that determines whether or not the design is patentable. “The design must be considered by the impression it produces as a whole.” *Sel-O-Rak Corp. v. Henry Hanger, etc.*

Corp., 232 F. 2d 176, 179 (5 Cir. 1956). "A design must be judged from its appearance as a whole * * * *'" Application of Peet, 211 F. 2d 600, 601 (C.C.P.A. 1954).

The appearance of the Cameron design can be seen in figures 1, 2 and 3 of plaintiff's exhibit No. 2, which is hereby incorporated in this Memorandum. Referring again to the Royal cigar showcase as an example of the prior art, and comparing plaintiff's Cameron design when viewed as a whole, with the Royal showcase when viewed as a whole, the similarity is so great and the differences so slight, that it can only be said that both designs produce the same impression to the observer. This Court cannot say that the Cameron design produces a new impression upon the eye when it is compared to the Royal showcase; "The combination of old forms to produce a new and ornamental design is not patentable unless the new design produces a new impression upon the eye." *Forestek Plating & Mfg. Co. v. Knapp-Monarch Co.*, 106 F. 2d 554, 559 (6 Cir. 1939).

The Cameron design strongly resembles the prior art in general appearance and central theme, and as the court ruled in *Western Auto Supply Co. v. American-National Co.*, 114 F. 2d 711, 712 (6 Cir. 1940): "When the idea is adapted or derived by analogy from prior usage, or when it is embodied in a design resembling the prior art in general appearance or central theme, there is no patentable invention." The plaintiff's design is a particularly streamlined, well proportioned and

harmonious arrangement of the elements of the general type of showcase that had been in use in the industry prior to the application for the Cameron design patent, but it does not constitute something new, different and original in the art. As the Court of Appeals for this circuit held in *Magarian v. Detroit Products Co.*, 127 F. 2d 544, 545 (9. Cir. 1942): "It may readily be conceded, as appellant contends, that the design of the arm is streamlined and pleasing in appearance; but this is insufficient in the absence of invention. (Citations omitted.)"

Plaintiff produced the testimony of Mr. Marcus Glaser, who is unquestionably an expert in the field of cigar showcases; his testimony clearly established the commercial success of the Patriarca device which bears the Cameron design.

Evidence of the commercial success of a device is admissible in weighing the validity of a mechanical patent, but it is of real value only if the question of validity is a close one. This rule was expressed in *Pointer v. Six Wheel Corp.*, 172 F. 2d 153, 156 (9 Cir. 1949):

"Commercial success may be taken into consideration in determining validity. The trend, at the present time, is to use it as a makeweight only 'where the patentability question is close.' (Citations omitted)."

And in *Application of Lange*, 228 F.2d 245, 246, (C.C.P.A. 1955): "It is well settled, however, that commercial success cannot be relied on to establish

patentability except in cases which are otherwise doubtful. (Citations omitted)."

It is also true that in considering the validity of a design patent, evidence of commercial acceptance of the design, is relevant to the issue of invention:

"Whether a design which is novel and ornamental is entitled to coverage by a design patent depends to a large degree upon the reception which those for whom it is made, accord it."

Battery Patents Corp. v. Coe, 93 F.2d 220, 226 (D.C. Cir. 1937), quoting from Standard Match Corp. v. Bell Mach. Co., 83 F.2d 365, 367 (7 Cir. 1936).

But commercial success does not supply invention where that crucial element is clearly absent: "Where * * * invention is plainly lacking, commercial success cannot fill the void. (Citations omitted)." *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 567.

Furthermore, plaintiff made no attempt to demonstrate how much of the commercial success of its product was the result of the design of the device, how much was due to the claimed increase in mechanical efficiency, or how much might have been due to still other factors. The weakness of such a showing was described in *Circle S Products Co. v. Powell Products*, 174 F.2d 562, 564 (7 Cir. 1949):

"The commercial success which they claim for their product we think is of little, if any, benefit in the instant matter. As was pointed out in *Bayley & Sons, Inc. v. Standart Art Glass Co., et al.*, 2 Cir., 249 F. 478, in response to a similar argument, there is nothing in the record to show what portion of the

asserted success was due to the mechanical or utility features of the device and what, if any, was attributable to the design.”

The basic test of patentability of a design is the same as that for a mechanical patent, that is, was the design beyond the powers of the ordinary designer? *Connecticut Paper Products Co. v. New York Paper Co.*, 127 F.2d 423, and cases cited at 429 (4 Cir. 1942). A design may be sufficiently attractive and streamlined to achieve commercial success and yet be within the ability of the ordinary designer in the field. This factor is emphasized in *Butcher Boy Refrigerator Door Co. v. Phillips Refrigeration Products Co.*, 144 F.Supp. 331, 339 (N.D.Cal. 1956):

“More is required for a valid design patent than that the design be new and pleasing enough to catch the trade; it must be the product of invention, by which it is meant that conception of the design must demand some exceptional talent beyond the skill of the ordinary designer. *Neufeld-Furst & Co. v. Jay-Day Frocks*, 2 Cir., 112 F.2d 715; see also *S. Dresner & Son v. Doppelt*, 7 Cir., 120 F.2d 50; *Zangerle & Peterson Co. v. Venice Furniture & Novelty Mfg. Co.*, 7 Cir., 133 F.2d 266; *Hueter v. Compco Corp.*, 7 Cir., 179 F.2d 416.”

Accordingly, because the appearance of the Cameron design does not produce a new impression on the eye when compared with the prior art, and because the differences between the Cameron design and prior designs are within the ability of the ordinary designer in the field of display showcases, it is

the opinion and conclusion of this Court that the Cameron design patent is invalid for lack of invention and because of anticipation in the prior art.

Therefore it is concluded that Patriarca patent U.S. No. 2,735,739 is invalid as to claims 3 and 4 thereof; that Cameron patent U.S. No. Des. 168,-288 is invalid; and that the defendants should be awarded judgment, together with their costs expended herein.

Counsel for defendants are directed to prepare and present findings, conclusions and a judgment in accordance herewith.

Dated: December 23rd, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed December 23, 1958.

[Title of District Court and Cause Nos. 35332 and 35349.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff Patriarca Mfg. Co., Inc., is a corporation of Rhode Island having its principal place of business in Providence, Rhode Island.

2. Plaintiffs Domenico Patriarca and Donald A. Cameron are individuals and residents of the City of Cranston, State of Rhode Island.

3. Defendants Melvin Sosnick, Marvin Sosnick and Peter Sosnick are defendants in No. 35332 and individuals, all residents of the City and County of San Francisco, State of California and are doing business as a co-partnership in the City and County of San Francisco under the name and style of Melvin Sosnick Company. The said defendants will be referred to as the "defendants Sosnick."

4. The defendant Alfred Austruy is defendant in No. 35349 and is an individual and a resident of the City and County of San Francisco, State of California.

5. The suit against the defendants Sosnick (No. 35332) and the suit against the defendant Austruy (No. 35349) have been consolidated for trial.

6. On February 21, 1956, United States Letters Patent No. 2,735,739, entitled "Self-Server Display Cabinet" were issued to plaintiff Domenico Patriarca, said patent being referred to hereinafter as "the Utility Patent."

7. On December 2, 1952, United States Letters Patent No. Design 168,288, entitled "Self-Service Display Container" were issued to Donald A. Cameron, said patent being referred to hereinafter as "the Design Patent."

8. By virtue of exclusive license agreements between said individual plaintiffs and said corporate plaintiff the corporate plaintiff, Patriarca Mfg., Inc., is the exclusive licensee of both said patents and is a proper party herein.

9. This is a suit for alleged infringement of said Utility Patent and said Design Patent by defend-

ants, the said patents being for a cigar showcase, the Utility Patent being for the mechanical and utilitarian features thereof and the Design Patent being for the ornamental features thereof.

10. The defendants Sosnick admit having sold certain cigar showcases identical with plaintiffs' Exh. 10, a physical exhibit, and the defendant Austruy admits having purchased from the defendants Sosnick and having used a cigar showcase identical with plaintiffs' Exh. 10.

The Utility Patent
(Patriarca Patent No. 2,735,739)

11. By stipulation both suits have been dismissed with prejudice as to Claims 1 and 2 of the Utility Patent, leaving only Claims 3 and 4 thereof in issue.

12. Defendants have pleaded invalidity and non-infringement of the Utility Patent.

13. The Utility Patent is for the utilitarian and mechanical features of a cigar showcase typified by plaintiffs' Exh. 5 and comprising the following elements:

- (1) A base
- (2) Side walls
- (3) A rear wall
- (4) A top
- (5) A lower front wall
- (6) An upper front opening
- (7) Sliding glass doors for the upper front opening which slant outwardly from top to bottom permitting a retail customer to slide back the glass

doors and serve himself from the selection of cigars displayed inside.

(8) A series of steps behind the glass doors which serve as a support for boxes of cigars and as a partition between the cigars displayed to the public and the back portion of the cabinet which houses storage space for the merchant's stock of cigars as well as a humidifier (Element 9). Such partition is perforated to permit humidified air to circulate among the cigars displayed as well as those stored behind the partition.

(9) A humidifier which is elevated above the floor of the cabinet.

The rear wall (Element No. 3 above) includes sliding doors for access to the storage area and humidifier.

The humidifier (Element No. 9 above) is elevated above the floor of the cabinet on the theory (which is not stated in the descriptive portion of the patent) that better circulation of humidified air is obtained than if the humidifier were resting on the base or floor of the cabinet.

14. Each of the elements enumerated in Finding No. 13 is anticipated by the prior art.

15. Defendants' Exh. A, a physical exhibit, of which Exhs. K and M are admitted to be photographs, is a cigar showcase manufactured and sold by Royal Showcase Company of San Francisco, California more than one year prior to the filing date of the Utility Patent (and also more than one year prior to the filing date of the Design Patent). Such prior showcase will be referred to hereinafter as the "Royal showcase."

16. The Royal showcase contains elements (1) to (8) enumerated in Finding No. 13.

17. The wooden steps of the Royal showcase (corresponding to element No. (8) in Finding No. 13) are not perforated but it was known in the art prior to the filing date of the Utility Patent to provide such steps with partitions for the purpose of ventilation.

18. The provision of a humidifier for a cigar showcase is not inventive because the use of humidifiers for cigar showcases is old.

19. Plaintiffs contend that the elevation of their humidifier off of the floor or base of the showcase constitutes invention but such is not invention in view of convincing evidence that with a convection type of humidifier resting on the floor (as used by defendants) the performance is just as good and that elevation of such humidifier would have no beneficial effect. Moreover, if the elevation of the humidifier is a critical and inventive feature, then defendants do not appropriate such feature.

20. The showcase of the Utility Patent represents at best a combination of old features which produces no new result and which does not rise to the dignity of patentable invention.

21. The showcase of the Utility Patent represents an advance in efficiency and utility but the key element in this showcase, which plaintiffs contend is the elevation of the humidifier above the floor of the cabinet, would not require the exercise of inventive talent beyond the ordinary skilled artisan in the field of humidified showcases.

The Design Patent

(Cameron Patent Des. 168288)

22. Comparing the appearance of the showcase of the Design Patent with the appearance of the Royal showcase and viewed as a whole, the similarities are so great and the differences are so slight that the same impression is produced on the observer.

23. The showcase of the Design Patent does not produce a new impression on the eye when compared to the Royal showcase.

24. The showcase of the Design Patent strongly resembles the prior art in general appearance and central theme.

25. The showcase of the Design Patent is a particularly streamlined, well proportioned and harmonious arrangement of the elements of the general type of showcases that have been in use in the industry prior to the application for the Design Patent but it does not constitute something new, different and original in the art.

26. The testimony of Marcus Glaser, who is an expert in the field of cigar showcases, clearly established commercial success of the showcase of the Design Patent but the said showcase is so clearly lacking in invention that its commercial success cannot persuade one that the showcase presents the quality of patentable invention.

27. The evidence regarding commercial success of the showcase of the Design Patent does not demonstrate to what extent such commercial success was

due to the design itself, how much to the increase in mechanical efficiency (which forms no part of the alleged design invention) and how much to other factors.

28. The differences between the showcase of the Design Patent and prior designs such as the Royal showcase are within the ability of the ordinary designer in the field of display showcases.

29. The showcase of the Design Patent does not rise to the dignity of patentable invention.

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter.

2. Claims 3 and 4 of the Patriarca U. S. Patent No. 2,735,739 are invalid for lack of invention.

3. Cameron U. S. Design Patent No. Des. 168288 is invalid for lack of invention.

4. Claims 1 and 2 of Patriarca Patent No. 2,735,739 are withdrawn with prejudice.

5. The complaint should be dismissed with prejudice and costs allowed defendants.

Entered this 11th day of February, 1959.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form:

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed February 13, 1959.

In the United States District Court, Northern
District of California, Southern Division

No. 35332

PATRIARCA MFG., INC., a corporation, et al.,
Plaintiffs,

vs.

MELVIN SOSNICK, et al., Defendants.

No. 35349

PATRIARCA MFG., INC., a corporation, et al.,
Plaintiffs,

vs.

ALFRED AUSTRUY, an individual, et al.,
Defendants.

JUDGMENT

These causes having come on for trial on plaintiffs' complaints and defendants' answers, the causes having been consolidated and tried and argued, findings of fact and conclusions of law having been adopted by the Court and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed,
as follows:

1. That the complaints on file herein be dismissed as to all defendants with prejudice and upon the merits.

2. That defendants be awarded costs in the amount of and have execution for the same.

Entered this 13th day of February, 1959.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form:

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed February 13, 1959.

[Title of District Court and Cause Nos. 35332 and 35349.]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, Patriarca Mfg., Inc., a corporation, Domenico Patriarca and Donald A. Cameron, individuals, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment dated and entered herein February 13th, 1959, for defendants, Melvin Sosnick, Marvin Sosnick and Peter Sosnick, a copartnership, doing business as Melvin Sosnick Co., and Melvin Sosnick, Marvin Sosnick and Peter Sosnick, individuals, and Alfred Austruy, an individual.

Dated: March 10, 1959.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed March 10, 1959.

[Title of District Court and Cause Nos. 35332 and 35349.]

BOND FOR COSTS

Whereas, Patriarca Mfg., Inc., et al and Patriarco Mfg., Inc., a Corporation, have appealed to the United States Court of Appeals for the Ninth Circuit from certain judgments rendered against said Patricarca Mfg., Inc., et al and Patriarco Mfg., Inc., a Corporation, in said actions in the above entitled court and in favor of Melvin Sosnick, et al and Alfred Austruy, an individual, et al, and entered on February 13th, 1959.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Glens Falls Insurance Company, a corporation organized and existing under the laws of the State of New York and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the above named Plaintiffs, that said Plaintiffs will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty Dollars (\$250.00), to which amount the Plaintiffs acknowledge themselves bound.

It is further stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above named Court may upon ten (10) days notice to the surety above named, proceed summarily in said proceedings to ascertain

the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not exceeding, however, the said sum of Two Hundred Fifty Dollars (\$250.00).

In Witness Whereof, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney at San Francisco, California, this 9th day of March, 1959.

[Seal] GLENS FALLS INSURANCE
COMPANY,

/s/ By FRANK W. PAYNE,
Attorney.

Notary's Certificate Attached.

[Endorsed]: Filed March 10, 1959.

[Title of District Court and Cause Nos. 35332 and
35349.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled cases and constitute the record on appeal herein as designated by attorneys for the Appellants:

Case 35332

Excerpt from Docket Entries.

Complaint.

Answer.

Notice of Additional Defenses by Defendant.

Amended Complaint.

Stipulation re Answer.

35349—Civil

Excerpt from Docket Entries.

Complaint.

Answer.

Amended Complaint.

Stipulation re Answer.

35332-35349—consolidated

Memorandum for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Appellants' Designation of Record on Appeal.

Reporters' Transcript of Proceedings Jan. 16 & 17, 1957.

Plaintiffs' Exhibits 1, 2, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16 and 17.

Defendants' Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, and T.

I Further Certify that Plaintiffs' Exhibits 3, 4, 5 and 10 and Defendants' Exhibit A, are not included

in this record for the reason such exhibits are not among the records in this office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 17th day of April, 1959.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By MARGARET P. BLAIR,

Deputy.

[Title of District Court and Cause Nos. 35332 and 35349.]

REPORTER'S TRANSCRIPT

Proceedings of Trial

January 16-17, 1957

10:00 A.M.

Before: Hon. Oliver J. Carter, Judge.

Appearances: For the Plaintiffs: Oscar A. Mellin, Esq., and Jack E. Hursh, Esq. For the Defendants: Edward Gregg, Esq., and Robert G. Slick, Esq. [1]*

* * * * *

Opening Statement On Behalf of The Plaintiff

Mr. Mellin: If your Honor please, before that time, in order to simplify some of the testimony, that is to eliminate some of the issues and shorten

* Page numbers appearing at top of page of Reporter's Transcript of Record.

the trial, may I ask whether [4] or not the defense will stipulate that the plaintiff, Patriarca Manufacturing Corporation, is the exclusive licensee under the letters patent in suit?

Mr. Gregg: We will so stipulate, your Honor.

Mr. Mellin: I would also like to know if they would stipulate that the plaintiffs Domenico Patriarca and Donald A. Cameron are the owners of all the legal title to the patents in suit, that is, design 168288 and Domenico Patriarca is the owner of the title to 2,735,739.

Mr. Gregg: We will so stipulate. [5]

* * * * *

Mr. Mellin: I will offer Patent 2,735,739 as Exhibit 1 and Design Patent 168,288 as Exhibit 2.

The Court: Plaintiffs' Exhibits 1 and 2.

(Patent 2,735,739 was thereupon received in evidence and marked Exhibit 1, and Design Patent 168,288 was received in evidence and marked Exhibit 2.)

[See Book of Exhibits.]

* * * * * [13]

DOMENICO PATRIARCA

was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

The Clerk: Will you state your name, your age and residence, Mr. Patriarca?

A. Domenico Patriarca.

Q. What is your age? A. Fifty-five.

Q. And your residence address?

A. 62 Seaview Avenue, Cranston, Ohio.

Direct Examination

Q. (By Mr. Mellin): What is your occupation, Mr. Patriarca? A. I am a cabinetmaker.

Q. What businesses have you followed, say, prior to the last [24] four or five years?

A. What type of business?

Q. What was your trade or profession?

A. It has always been a cabinetmaker. I have been in that all my life.

Q. And you are the Domenico Patriarca named in Patent No. 2,735,739 in suit, Exhibit 1?

A. Correct.

(Charts were placed on a blackboard.)

Q. Mr. Patriarca, do you recognize the enlargement on the left as a duplicate enlarged view of the Design Patent in suit? A. That is correct.

Q. And the one on the right is the duplicate of the other patent figure, Exhibit 1 in suit as to figures 1 and 2 of that patent?

A. That is right.

(Testimony of Domenico Patriarca.)

Mr. Mellin: May I offer those in evidence, your Honor, as next in order?

The Court: All right. Plaintiff's Exhibit 3 will be the enlargement of the Design Patent; Plaintiff's Exhibit 4 will be the enlargement of the Mechanical Patent.

(Enlargement of the Design Patent was thereupon marked Plaintiff's Exhibit 3, and the enlargement of the Mechanical Patent was Marked Plaintiff's Exhibit 4.) [25]

Mr. Mellin: May I have this cabinet on the right, your Honor, marked for identification as Exhibit 5?

The Court: You may.

(The cabinet referred to was thereupon marked Plaintiff's Exhibit 5 for identification.)

Q. (By Mr. Mellin): Mr. Patriarca, referring to Exhibit 5 for identification, you are familiar with that cabinet, are you? A. Correct.

Q. Is that the same or different in appearance, in your opinion, from the design shown in the Cameron Patent, Exhibit 2?

A. That is exactly the same with one exception. On that particular one they have a money rail in back there, especially at one customer's request.

Q. What I have my hand on? A. Yes.

Q. Does that change the appearance of the cabinet? A. No.

Q. To your knowledge were the patent drawings of the two patents in suit made for a cabinet the same as Exhibit No. 5 for identification?

(Testimony of Domenico Patriarca.)

A. Yes.

Q. Is this cabinet No. 5 for identification one of your manufacture? A. Yes.

Mr. Mellin: May I offer it in evidence, your Honor? [26]

The Court: It may be admitted in evidence as Plaintiff's Exhibit 5.

(Plaintiff's Exhibit 5 for identification was thereupon received in evidence.)

Q. (By Mr. Mellin): Mr. Patriarca, will you tell us the circumstances which lead up to the creation of this cabinet, Exhibit 5, as shown in the two patents in suit? Tell us first when was this creation accomplished, if it was a creation.

A. 1955, in the fall of 1955.

Q. I mean the invention of the patent in suit.

A. That is correct.

Q. '55 or '51?

A. '55. I beg your pardon.

Mr. Mellin: I did not mean to lead the witness. I knew he was in obvious error.

The Court: You had the right to do so.

Mr. Mellin: What occurred at that time, if anything?

A. I have been in the woodwork business all my life. I have done some work for Mr. Cameron in the past.

Q. What business was Mr. Cameron in at that time?

A. He is a druggist. He used to be in the drug business. From time to time I did some work in his

(Testimony of Domenico Patriarca.)

store for him. Among other things, prior to the fall of 1951, we made him a cigar case. The cigar case was one of the—well, I refer to it as the old-fashioned cigar case, conventional at the time, which [27] is nothing but a square box with glass on top and front and the cigars underneath. I lived close by together, and I used his drugstore for my home needs. I used to—sometimes I hesitated to go into it because he used to complain about the cigar case. He was happy about everything else we did but he complained about the cigar case. And he brought to my attention that the cigar industry needs something to revive, and he brought to my attention that he couldn't afford to allocate more room, but he still should have displayed more cigars. He brought to my attention some of the cigars, they were drying up. So we started to discuss the subject—

Q. When you say "we," you and Mr. Cameron?

A. Mr. Cameron and I. We went along and the subject intrigued me. And we finally—I went to the shop and I prepared some rough models. I called Cameron, Cameron came over, and we started to fool around, raise this, lower that with actual rough models. After I got through with the model and built the case I delivered it to Mr. Cameron's store and I forgot about it. Approximately ten days or two weeks later I get a call from Mr. Cameron, and frankly I thought he was going to kick about the price, just because just about that time he had the bill.

He started mentioning the case and he said,

(Testimony of Domenico Patriarca.)

"Well, Mr. Patriarca, you know this case—" and I was ready to explode because I didn't charge him any amount, any money for the time [28] it took to devise the thing; I merely charged him for the work involved to build the case.

"No," he said, "I was not referring to the cost. I am referring that I think this is something hot." He said, "The trade needs this very bad. I got about a dozen cigar salesmen and they are so enthused, I think we should patent it."

That is where that started. We went to the lawyer. We both signed some type of a petition, or we gave him the power of attorney, and that is how the business started, and that is the honest truth.

Q. Did you and Mr. Cameron work together on the design and the creation of this device we are talking about shown in the two patents?

A. Yes.

Q. After that, Mr. Patriarca, did you go into the business of manufacturing these cabinets?

A. We called the attention of a local cigar distributor, which was Costello. We had a talk with him—I mean to them—to find out what the possibilities were and what they thought of it, and so forth, and they seemed to think the thing was grand, the best ever that ever hit the cigar industry. So from that, I don't recall if Costello called Manning in Boston, which is forty-five miles away, or perhaps we might contact Manning in Boston, also a cigar distributor. Now, Manning called the Cigar Institute of America and told them he had something

(Testimony of Domenico Patriarca.)

hot. 29] The Cigar Institute of America directed Mr. Gene Raymond to fly from New York to Boston to take a look at the cabinet or the cigar humidor. As soon as he saw it he went wild. He was raving and full of compliments. He told me that they were having a convention, a cigar manufacturers convention in Atlantic City the following month or thereabout within a couple of weeks from the time we had this discussion, and he begged me to bring one cabinet to Atlantic City so that he could show it to cigar manufacturers. I told him I would, and we sent the cabinet to Atlantic City.

Q. When did you commence to commercially manufacture them?

A. I would say just about that time.

Q. That was when? A. 1951.

Q. Since that time have you continuously manufactured these cabinets?

A. Definitely. We give up general woodworking and we devoted our entire time to the cigar humidor.

Q. Those cabinets that you commenced to manufacture, were they the same or different than Exhibit 5 that is here? A. Exact.

Q. I hand you a paper which says "Sales of Self-Service Cigar Humidors." Can you identify it?

A. That is right.

Q. What is it? [30]

A. It is one thousand—

Q. I don't mean the number. What is the record? A. The record is a sales record.

(Testimony of Domenico Patriarca.)

Q. That is a sales record of the Patriarca Manufacturing Company? A. That is right.

Q. And you are for all practical purposes the Patriarca Manufacturing Company?

A. That is correct.

Mr. Mellin: May I offer this record in evidence, your Honor?

The Court: You may, Exhibit 6.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 6.)

[See Book of Exhibits.]

Mr. Mellin: This is a record of the sales of Patriarca Manufacturing Company of the cabinets shown in the patent suit, and if I may read it into the record, it states that in 1951 they sold 20 units, 1952, 303 units, 1953, 828 units, 1954, 883 units, 1955, 975, 1956, 1,042, for a total amount of \$1,360,424.25.

Q. Over what geographical area were those sold, Mr. Patriarca?

A. All over the United States, Alaska and Switzerland.

Q. Of your own knowledge do you know the approximate amount of money that you spent in advertising these humidors?

A. I would say in the neighborhood of \$60,000.

Q. Altogether? A. That is right.

Q. What about the first year, 1951? What would you say? A. 1951, about \$600.

Q. And 1952? A. 1952, about \$4,500.

(Testimony of Domenico Patriarca.)

Q. You told me the total amount spent yesterday, that you roughly calculated something in the order of 2% of the sales?

A. That is correct.

Q. What form of advertising did you employ? Catalogues?

A. Catalogues we gave to our distributors and trade magazines, just a small ad in the trade magazine.

Q. Do you have any salesmen out?

A. No.

Q. Did you ever have any salesmen out?

A. Just for maybe six months we had a man. We tried him out, but it wasn't a profitable venture, so we eliminated him.

Q. Did you or your company make any effort to determine whether the use of these patented humidors increased the sales of cigars or decreased them?

A. Yes, we made one survey in 1952. We did send out 200 letters. The first 200 people that bought cigar humidors. We asked various questions—if they were happy with the case, and if the case helped their cigar business, if they were sorry, if they sold the case, and so forth—and we had, oh, approximately [32] 48 responses out of 200, or 47.

Q. I hand you what appears to be a questionnaire on the letterhead of Patriarca Store Fixtures, Inc., December 8, 1952. Is that one of these questionnaire letters that you just referred to?

A. That is correct.

(Testimony of Domenico Patriarca.)

Q. As to the questions on it, the answers that appear and the markings, were the markings of whom? A. Of the retailer himself.

Q. And the one I'm handing you is out of a number of these you received back? A. Yes.

Q. Is it or is it not a typical response?

A. It is a typical response.

Q. That shows, of course, in there sales of 35% according to, of course, the retailer.

Mr. Gregg: Your Honor, I want to make an objection on the ground that the answers on this so-called typical letter are hearsay. If Mr. Mellin is offering this as proof of the facts indicated on the questionnaire, it is clearly hearsay and objectionable.

Mr. Mellin: If your Honor please, these questionnaires were sent out, and although it is not proof of the fact that they did increase their sales 35%, it is proof of the fact that they advised them it increased their sales to that extent. [33] With that limitation I offer it in evidence as a typical response to that questionnaire.

The Court: I will overrule the objection and it will be admitted in evidence for that limited purpose.

Mr. Mellin: For that limited purpose, your Honor, yes.

The Court: Plaintiff's Exhibit 7.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 7.)

[See Book of Exhibits.]

(Testimony of Domenico Patriarca.)

Mr. Mellin: I may tell the court I am offering merely a typical one because I have a summary of them.

Q. I also hand you what appears to be a recapitulation of the responses you received from these questionnaires, and I ask you to pay no attention to the bottom four lines, but ask you if you can identify the paper. A. Yes, I do.

Q. Will you state whether or not that is a recapitulation of what was given in answer to the questionnaires that you sent out?

A. That is correct.

Q. And gives the correct number of the questions sent out?

A. To the best of my knowledge.

Q. And it is accurate to the best of your knowledge? A. To the best of my knowledge.

Mr. Mellin: This is a recapitulation, your Honor, of the answers to the questionnaires received. [34]

Mr. Gregg: Your Honor, I would like the same ruling to apply to this exhibit, namely, it is not admitting as proving a fact that certain results were obtained by customers.

Mr. Mellin: That is not what it is offered for, your Honor. It merely shows what the answers to the questionnaires are.

The Court: What the same limitation it will be admitted in evidence as Plaintiff's Exhibit 8.

(The summary referred to was thereupon received in evidence and marked Plaintiff's Exhibit 8.)

[See Book of Exhibits.]

(Testimony of Domenico Patriarca.)

Q. (By Mr. Mellin): Will you state whether or not your company received any unsolicited letters commenting on the merits of this patented humidor? A. Hundreds.

Q. I hand you a group of one, two, three, four, five letters directed to your company and ask you if you received these letters in the due course of mail?

A. Yes.

Q. And you received hundreds of them?

A. Yes.

Q. Are these typical of those?

A. That is correct.

Mr. Mellin: I will offer these as our exhibits next in order.

Mr. Gregg: Your Honor, within the same limited scope [35] in connection with the previous exhibits—

Mr. Mellin: Is proof that the letters were received stating that, but not proof of the fact of what they state.

The Court: That is all right.

Mr. Gregg: Are you marking those?

Mr. Mellin: Yes, they may be offered in evidence.

The Court: The five letters will be admitted as Plaintiff's Exhibit 9.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 9.)

[See Book of Exhibits.]

(Testimony of Domenico Patriarca.)

Mr. Mellin: May I have the cabinet on the left marked for identification?

The Court: You may, Plaintiff's Exhibit 10 for identification.

Q. (By Mr. Mellin): Have you examined a cabinet marked Exhibit 10, or Exhibit 10 itself?

A. Yes.

Q. You are familiar with its construction?

A. That is correct.

Q. With respect to this accused humidor, Exhibit 10, will you state the differences, if any, and the similarities, if any, between it and the humidor disclosed in Exhibit 2, the design patent, as far as external appearances are concerned?

A. I would say it is the same.

Q. Would you say it is identical or different in any respect? [36]

A. I would say that every line, touch and twist, the thing is exactly the same.

Q. Have you examined the cabinet so far as its mechanical makeup is concerned, this humidor, Exhibit 10?

A. It is practically just exactly.

Q. You have examined it? A. Yes.

Q. Will you state the differences, if any, and the similarities, if any, between it and the cabinet construction shown in Exhibit 1, Patent 2,735,739?

A. I would say it is the same. However, there might be a little difference in workmanship and material.

(Testimony of Domenico Patriarca.)

Q. Well, did you measure the cabinet with respect to one of your commercial cabinets?

A. Yes, I would say that it's close to a fraction of an inch.

Q. In other words, it is right to the fraction of an inch? A. Yes.

Q. In length, width and height? A. Yes.

Q. You heard counsel tell the court that there was a difference between the mounting of the humidor in the patent Exhibit 1 and the mounting of the humidor in the cabinet or humidor Exhibit 10?

A. Yes.

Q. In other words, what is the difference in these mountings physically? [37]

A. Well, they practically amount to the same thing. It is elevated from the base.

Q. What is the reason for elevating it from the base?

A. To get better circulation and eliminate the rotting on the bottom.

Q. In other words, you raise it off the bottom to keep it from rotting and also for circulation?

A. Free circulation.

Q. The fact that in the patent it may be a little higher elevation wouldn't mean it would get just a little better circulation? A. That is right.

Q. Are there any other differences in structural features, I mean of any importance?

A. No, I would not say so. I think the cabinet—they couldn't make them closer if they tried.

Q. In view of the fact that you measured the

(Testimony of Domenico Patriarca.)

two and found their dimensions to be the same within fractions of an inch and their construction, and bear in mind also the fact that they do not elevate their humidor as high as it is shown elevated in the patent in suit, in your opinion as a cabinet-maker would you say one was a copy from the other? A. Definitely.

Q. Definitely, did you say? A. Yes. [38]

Mr. Mellin: May I offer the accused humidor in evidence as Exhibit 10?

The Court: It will be admitted in evidence as Exhibit 10.

(The humidor referred to was thereupon received in evidence and marked Plaintiff's Exhibit 10.)

Q. (By Mr. Mellin): Mr. Patriarca, referring to both cabinets, that is, Exhibits 5 and 10, will you tell us their advantages if they have any?

A. In my opinion, when I first started, I thought that particular cabinet will subdue the woodwork, which is what most of the fixture people do today. They try to subdue the cabinet itself and bring up, bring forward the display of cigars, and also it will display the cigars evenly and equally.

Q. By equally do you mean give every cigar—

A. The same break. The old cigar case, you will find the front row got all the play and the back row didn't get any show. That is usual. Then what we did accomplish was that prior to our cigar humidor every case made in the country was more or less—you could display twenty-four boxes in six feet.

(Testimony of Domenico Patriarca.)

Well, we increased the twenty-four to forty in the same amount of space. So we thought we would recover about thirty-five percent of the floor space, which was a very important item to the retailers. Next we combined the well-balance display, attractive, and we humidified the display [39] part in the storage compartment.

Q. The storage compartment is divided from the display compartment by this step perforated plate?

A. By the perforated metal steps.

Q. And that made the humidity equal all through the case?

A. Equal all through the case.

Q. What was the advantage of that, if any?

A. If we did work that perforated step idea, that couldn't be accomplished—I mean we could either humidify the display or we could humidify the storage, but we couldn't humidify both at the same time.

The Court: Without two units?

A. That is right.

Q. One unit you could humidify both sides with the perforated steps?

A. That is correct.

Q. (By Mr. Mellin): And that also concealed the humidifier?

A. That is right.

The Court: Mr. Mellin, when you come to a convenient point we will recess.

Mr. Mellin: I can stop right at this minute, your Honor.

The Court: We should take our morning recess.

(Testimony of Domenico Patriarca.)

We will go forward with this testimony after the recess.

(Recess.)

Q. (By Mr. Mellin): Mr. Patriarca, you testified about [40] catalogues, that your company Patriarca Manufacturing Company put them out. I hand you what appear to be catalogues and I ask you if these are the catalogues you refer to that were put out and the advertising cost that you had.

A. That is right.

Mr. Mellin: May I offer those, your Honor, as next in order as a group?

The Court: Yes. How many are there?

Mr. Mellin: Five.

The Court: They will all be admitted as one exhibit, Plaintiff's Exhibit 11.

(Catalogues referred to were thereupon received in evidence as Exhibit 11.)

Q. (By Mr. Mellin): Mr. Patriarca, have you read and are you familiar with Claims 3 and 4 of the Patriarca patent?

A. That is right.

Q. Will you state whether or not in your opinion those claims read precisely or not precisely on the accused humidior, Exhibit 10?

A. I would say they would be precisely.

Q. You heard it emphasized that in the humidior, the humidifier was located at a different elevation than it is in that patent.

A. That is right.

Q. But it is elevated above the base of the cabinet, is it?

A. That is correct. [41]

Q. That is in Exhibit 10?

A. Yes.

(Testimony of Domenico Patriarca.)

Q. Will you state whether or not your company gave written notice of infringement to the defendants here? A. Yes.

Q. What response if any did you receive?

A. First, they seemed to stall for some time and we kept sending more notices and they just didn't do anything. They just took the attitude that we had no patents.

Q. After those notices of infringement did the defendants Sosnick commence to sell the cabinet of a different design, that is, somewhat different from the ones that are before us here?

A. That is correct. Oh, sometime after three or four months he did—it came to my attention that he started to sell a little different style of cabinet—exactly the same, actually it is exactly the same cabinet, except he made some change in the front panel. He just cut backwards instead of slanting downwards.

Mr. Mellin: If the court please, may he produce some models and show what the change consisted of?

The Court: Yes, he may.

The Witness: Actually, instead of bringing the cabinet down this way, he cut it this way and came down.

Q. (By Mr. Mellin): Is that the only change you could see? [42]

A. To the best of my knowledge that is the only thing.

Q. Can you mark on Exhibit 3 on Figure 3 the

(Testimony of Domenico Patriarca.)

change that was made? In other words, cut out that little triangular piece? A. That is right.

Q. In your opinion was that a substantial or a trivial change?

A. I would say that it's a trivial change. I mean it doesn't do any less or any more than the other does.

Q. Now when you put out this patented humidor that we have been speaking of did any others prominent in the industry attempt to duplicate it?

A. Yes.

Q. I ask you to compile a list—you were asked by counsel on the other side actually to compile a list of what occurred in each one. Do you have such a list? A. That is correct.

Q. I will show you that list and ask you if it is a correct and a complete list of those which you had notice of, of making a duplicate of the patented cabinet, and that you notified or called their attention to the patents, and there are notations on here as to what occurred after the notice; is it correct to those degrees? A. That is right.

Q. I will hand you the list and ask you if that is the list you had prepared for me? [43]

A. Yes.

Mr. Mellin: I offer that in evidence, your Honor, as next in order. May I call the attention of your Honor that on this list there is McKesson-Robbins, who, when their attention was called to this patent, stopped and they sell the Patriarca humidor at this time. The same is true of the large Bowman Corpo-

(Testimony of Domenico Patriarca.)

ration of Grand Rapids, Michigan, the Wilkenson Company of Providence, Rhode Island, the United Fixtures of Providence, Rhode Island, the Modern Store Fixtures of Providence, and the others stopped infringement save and except—or said they were changing—save and except the defendant here and certain other customers, who were notified under the statute that permits of such notification.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 12, that is, the list will.

(The list referred to was thereupon received in evidence and marked Plaintiff's Exhibit 12.)

[See Book of Exhibits.]

Mr. Mellin: Your Witness. Your Honor, I neglected to offer the file wrappers of the two patents in suit.

The Court: The file wrappers?

Mr. Mellin: The file histories.

The Court: You want to offer those in evidence?

Mr. Mellin: I would like to offer those in evidence. They should have gone in as one exhibit. May file wrapper in 2,735,739 be offered separately, and file wrapper of design [44] 168,288 as the next in order?

The Court: The file wrapper of the Mechanical Patent, that is, No. 2,735,739 will be admitted as Plaintiff's Exhibit 13, and Plaintiff's Exhibit 14 will be the file wrapper of Design Patent 168,288.

(The documents referred to were thereupon received in evidence and respectively marked Plaintiff's Exhibits 13 and 14.)

(Testimony of Domenico Patriarca.)

Cross Examination

Q. (By Mr. Gregg): Mr. Patriarca, one of the advantages of the cigar showcases that are in the courtroom, one of them marked as Plaintiff's Exhibit 5 and the other Plaintiff's Exhibit 10, one of the advantages of those showcases is that they are what are called self-service type of case, is that correct?

A. I wouldn't say that is primarily.

The Court: He said one of the advantages.

The Witness: Oh, yes, one of the advantages, yes.

Q. (By Mr. Gregg): Would you say it was one of the principal advantages? A. No.

Q. You call yours the Self-Service Showcase, don't you?

A. We happened to put the name that way.

Q. You do call yours the Self-Service Showcase? A. That is right.

Q. That is a particular quality that you advertise to the [45] public? A. Yes.

Q. You did not originate the Self-Service Showcase, did you, Mr. Patriarca?

A. That particular one we did.

Q. Did you originate first self-service cigar showcases?

A. I wouldn't know which one you are referring to.

Q. Let me put it this way: What do you under-

(Testimony of Domenico Patriarca.)

stand by self-service cigar showcase, and surely you must know since you call yours a self-server.

A. Repeat the question, please.

Q. Will you tell me what one means by the phrase "Self-Service Cigar Showcase"?

A. Self-service means you can help yourself.

Q. Instead of having a clerk reach around from behind you serve yourself? A. That is right.

Q. You were not the first person to develop and design and invent a self-service showcase, were you? A. I can't answer that.

Q. I think you answered it in your deposition given last week. Mr. Mellin, may I read from my copy of the deposition?

Mr. Mellin: You may.

Mr. Gregg: I am reading now from the deposition of Domenico Patriarca taken in this case on January 8, 1957, before [46] Rosemary Arnold, a notary public in the City and County of San Francisco. I am reading on page 10 of the deposition as follows, a question put by me to you:

"Q. Then you did not originate the self-service type of showcase, is that correct?

"A. I don't think so. I originated the particular one there."

Q. Are we agreed, Mr. Patriarca, that you, while you may have originated the particular cigar showcase in the courtroom, marked Plaintiff's Exhibit 5, you were not the first to originate a self-service cigar showcase?

A. I could not honestly answer that.

(Testimony of Domenico Patriarca.)

Q. But you did admit you did not in your deposition, didn't you?

A. Perhaps you might have caught me—I mean I am not very good in expressing myself. That is one handicap I have.

Q. You have been in the showcase business for thirty-five years; that has been your profession for thirty-five years, has it not?

A. I think woodworking has been my profession all my life. That is all I know.

Q. How long have you been in the cigar showcase business?

A. The cigar case business, we building fixtures, building a showcase before, we did build cigar cases as well. When we built a drugstore we had to build a candy rack, magazine rack, [47] wall cases, and also we built a cigar case.

Q. You have been in the cigar showcase business for many years; you are an old hand at it, is that correct?

A. I think so.

Q. As a matter of fact, you did not even originate the idea of sliding glass panels in cigar showcases, isn't that true, Mr. Patriarca? I am now manipulating Plaintiff's Exhibit 5. I am referring to the sliding glass panels. You did not even originate that feature, did you?

A. No, I did not originate the sliding panel.

Q. As a matter of fact, you did not even originate, in connection with cigar showcases—and again I am pointing to and referring to Plaintiff's Exhibit 5—you did not even originate the idea of steps

(Testimony of Domenico Patriarca.)

to support the cigar boxes; that is correct, isn't it?

A. In that particular case I did.

Q. I don't care what you originated in connection with that particular case, Mr. Patriarca. Were you the first person to employ the idea of steps to support cigar boxes?

A. In that particular manner we did.

Q. I am asking the question in general.

A. In general I couldn't answer that.

Q. So far as you know you originated the use of steps to support cigar boxes in a cigar showcase?

A. In that particular case, yes. [48]

Mr. Mellin: In that particular case you are talking about one of these?

The Witness: Yes.

Q. (By Mr. Gregg): Perhaps I can refresh your recollection somewhat by reading again from your deposition given last week, Mr. Patriarca. I am now reading on page 10 commencing at line 14:

"Q. Did you originate, you or Mr. Cameron or both of you, this feature of cigar showcases, a series of steps to support the cigar boxes?

"A. In that particular manner, yes.

"Q. What is the particular manner?

"A. The manner—the one in that particular case.

"Q. What is it? Describe it.

"A. Size, configuration, height, proportion and the amount of steps.

"Q. Can we put it this way, that steps were old,

(Testimony of Domenico Patriarca.)

but the particular height, configuration and shape were original with you.

“A. For that adaptation, yes.

“Q. Then you did not originate a step type of support but you originated a particular type of step support for cigar boxes?

“A. Well, you might call it that.

“Q. Do you wish to change your testimony in any [49] regard?”

Mr. Mellin: Just a moment. He is not changing his testimony. He is still saying these particular steps.

Q. (By Mr. Gregg): If you can't understand my question, Mr. Patriarca, please say so and I will try to rephrase them. I am now talking about the particular steps shown in Plaintiff's Exhibit 5; I am referring to steps in general.

Mr. Mellin: Disassociated from these cabinets.

Mr. Gregg: Disassociated from these cabinets, steps in a cigar showcase to support the cigar boxes:

Q. Had somebody got to that idea before you did? A. Not in that particular way.

Q. You have answered that question.

A. That is the only way I can answer.

The Court: What is the page of the deposition?

Mr. Gregg: The page of the deposition, your Honor, the last portion of it I read was page 10 of the deposition commencing at line 14 and ending on page 11 at line 1. The previous portion that I read in regard, I believe, to originating a self-service

(Testimony of Domenico Patriarca.)

type of cigar showcase was on page 10 of the deposition, lines 11 to 13. This is the Patriarca deposition.

Q. It is a fact, is it not, Mr. Patriarca, that you were not even the first to use a humidifier in connection with a cigar showcase, is that right?

A. No, I wasn't the first to use a humidifier.

Q. As a matter of fact, you were not even the first person to use what is variously described as an automatic or mechanical humidifier, is that correct?

A. No.

Q. During your examination by Mr. Mellin, Mr. Patriarca, you mentioned that the name Manning as a person who made some flattering remarks regarding your showcase. Do you know whether or not this gentleman Manning or his company sell any other line of showcases than Patriarca? A. No.

Q. You do not know whether he does or not?

A. To the best of my knowledge, no.

The Court: What do you mean by that? To the best of your knowledge you don't know?

A. I don't know if he sells any other kind of cases.

Q. (By Mr. Gregg): Now, Mr. Patriarca, you marked with a pencil Plaintiff's Exhibit 3, which is an enlargement of the drawing of Design Patent No. 168,288, and your marking indicated a change which was made after the notice of infringement was sent by you to the Sosnick Company. Do you know who made that change?

A. I do not know.

(Testimony of Domenico Patriarca.)

Q. You do not know whether the Sosnick Company made the change or not? A. No. [51]

Q. Or whether they were responsible for it or not? A. No.

Q. I direct your attention to Figure 1 of Design Patent 168,288 shown on the enlargement, Plaintiff's Exhibit 3, and to Figure 1 of Plaintiff's Exhibit 4, which is an enlargement of one of the drawings of the Mechanical Patent No. 2,735,739, and I ask you, those drawings are virtually identical, are they not? A. They are. [52]

* * * * *

Mr. Gregg: If your Honor please, you have on your left as you view it the cigar showcase which we will prove, when we put on our case, is a prior use and I would like to have it marked for identification as Defendants' Exhibit A.

The Court: Defendants' Exhibit A for identification.

(The cigar showcase referred to was thereupon marked Defendants' Exhibit A for identification.) [68]

* * * * *

Q. (By Mr. Gregg): Mr. Patriarca, it is a fact, is it not, that the customer coming into a cigar shop, liquor store or drugstore, some retail establishment selling cigars does not see the perforated metal step partition that is present in your showcase, isn't that correct? A. No, I wouldn't say so.

Q. Aren't the steps completely covered with boxes of cigars?

(Testimony of Domenico Patriarca.)

A. I wouldn't know. There is always a certain amount of space between boxes that can be seen. It is not actually displayed.

Q. I hand you a catalogue, which is one of a group of exhibits marked as Plaintiff's Exhibit 11, and directing your attention to the cover page, ask you if that is not the appearance of the cigar case to the cigar purchaser when he [78] comes into a store.

A. Will you repeat that question, please?

Q. Will you look at the cigar showcase shown on the cover of the catalogue which is in front of you, such catalogue being a group of exhibits marked as Plaintiff's Exhibit 11, and ask you if it is not correct, it is something like that which the cigar customer sees when he goes into a store?

A. Yes, that is true.

Q. Then a customer who goes into a store does not actually see the steps, isn't that right?

A. The steps can be seen.

Q. In other words, if the customer went to the trouble of removing some of the cigar boxes?

A. No, not remove the cigar boxes.

Mr. Mellin: If you look carefully enough.

The Witness: Yes.

Q. (By Mr. Gregg): Mr. Patriarca, are you aware of the fact that the cigar cabinets sold by the defendant Melvin Sosnick Company are not in fact manufactured by Melvin Sosnick Company but instead are manufactured by Rubenfeld Showcase Co.?

(Testimony of Domenico Patriarca.)

A. I learned that since I came up to the West. The Court: How is "Rubinfeld" spelled?

Mr. Gregg: Your Honor, it is R-u-b-i-n-f-e-l-d Showcase Company.

Q. You learned of that fact just within the last week or so, [79] isn't that correct?

A. That is right.

Q. I would like to hand you a letter. First I would like to exhibit it to counsel and have it marked for identification as defendants' next in order, B, I believe.

The Court: It is Exhibit B.

(The letter referred to was thereupon marked Defendants' Exhibit B for identification.)

Q. (By Mr. Gregg): I exhibit to you, Mr. Patriarca, Defendants' Exhibit B, which is a letter signed by Jack E. Hursh of the firm of Mellin, Hanscom & Hursh, dated July 30, 1956, directed to Eckhoff & Slick, Mills Tower, San Francisco, California, re Patriarca Mfg., Inc. versus Sosnick and Patriarca Mfg., Inc. versus Austruy, such letter outlining the terms of a proposed settlement of a case, and I direct your attention only to paragraph 5.

Mr. Mellin: Just a minute. By counsel's own statement this is a letter attempting to compromise this case and I think it is inadmissible.

The Court: It may very well be and it may not be. I do not know what the general rule would be that it would not.

(Testimony of Domenico Patriarca.)

Mr. Mellin: I will withdraw my objection. I see no point in the letter.

Q. (By Mr. Gregg): I direct your attention to paragraph 5, the last item in the letter, which reads as follows: [80]

“that Rubinfeld Showcase Company join in such settlement and abide by the terms thereof.”

I am not concerned at all, Mr. Patriarca, with the proposed terms of the settlement, but I direct your attention to that paragraph marked 5. How does it happen, Mr. Patriarca, that your counsel, Mellin, Hanscom & Hursh, in proposing a settlement of this suit on July 30, 1956, demanded as a condition of that settlement that Rubinfeld Showcase Company abide by the terms of the settlement? How do you reconcile that with your testimony just now that you learned only last week that Rubinfeld manufactured the cases that Sosnick puts out?

A. I don't know.

Q. Mr. Patriarca, apart from your apparent confusion about your knowledge of the relationship between Melvin Sosnick Company and Rubinfeld Showcase Company, quite apart from that, you did in fact know quite sometime ago that Rubinfeld Showcase Company does manufacture self-serving type of cigar showcases?

A. Yes, it came to our attention about, oh, I should say a year and a half ago or two years ago, I don't recall exactly, that Rubinfeld was making a

(Testimony of Domenico Patriarca.)

case similar to ours, and we have the correspondence, my attorney from Providence, and Rubinfeld had some kind of——

Q. Pardon me. I believe that is “Rubinfeld.”

A. I don't know exactly how it is pronounced. As a matter of [81] fact, I don't know how to explain it if I had to. So we corresponded back and forth, at least our attorney corresponded back and forth, and Rubinfeld I gave him a solemn promise that they were going to redesign the case and they were not going to make that case any more, and to the best of my knowledge he took for granted that Rubinfeld would start to make the case. That is why, even if it was called to my attention that they were still making the case, I still went on the assumption that he promised he would stop, cease making the case.

Q. Can you recall just about the time that you arrived at this assumption that Rubinfeld had quit manufacturing?

A. He wrote us.

Q. He wrote you?

A. Yes.

Q. Can you recall about when that was?

A. It was just about a year ago this time, because I remember at the time I came West, and that is just at the time Rubinfeld wrote back and said he was going to cease.

Q. You never followed up then, is that correct, Mr. Patriarca?

A. No.

Q. Isn't it a fact, Mr. Patriarca, that just about the last item of correspondence between yourself or somebody representing you on the one hand and

(Testimony of Domenico Patriarca.)

Rubinfeld Showcase Company on the [82] other hand was a letter notifying Rubinfeld that they were still infringing?

Mr. Mellin: Your Honor, this is even after the time this suit was filed. I do not see the relevancy of it, if he thinks there isn't any point in it.

Mr. Gregg: Your Honor, the relevancy is this——

The Court: He has not objected. I am not going to get into argument about it if he has not objected.

Mr. Gregg: I would like to have this letter marked for identification as Defendant's Exhibit next in order.

The Court: Defendant's Exhibit C.

(The letter referred to was thereupon received in evidence as Defendant's Exhibit C.)

[See Book of Exhibits.]

Q. (By Mr. Gregg): I hand you, Mr. Patriarca, Defendant's Exhibit C, which is a letter dated March 21, 1956, signed by Jack E. Hursh of the firm of Mellin, Hanscom & Hursh, directed to the Rubinfeld Showcase Company, 245 South Los Angeles, Los Angeles, California, and ask you to read it and see if you wish to change your testimony in any regard with respect to your assumption that Rubinfeld Showcase Company had quit manufacturing the type of case that you deemed to be an infringement.

Mr. Mellin: Is there a question pending?

Mr. Gregg: Yes. Will you read the question.

(Question read.) [83]

(Testimony of Domenico Patriarca.)

A. In January he did write to us and he said he was going to stop. For all purposes I thought he was. The chances are after that, maybe either by some other correspondence, but being perfectly frank with you I don't remember, but it is evident, it is there.

Q. Mr. Patriarca, Glaser Brothers is your exclusive representative in this area, are they not.

A. You couldn't call them exclusive because we have somebody else besides.

Q. Who else do you have?

A. McKesson-Robbins.

Q. There is an agreement between Patriarca Mfg. and Glaser, is there not, appointing them an exclusive distributor? A. Yes.

Q. Glaser Brothers is a cigar wholesaler, is it not? A. That is right.

Q. And they are in competition with Melvin Sosnick Company in the sale of cigars, is that correct?

A. I assume so. I am not acquainted with them.

Q. Don't you know that Melvin Sosnick is a cigar wholesaler? A. Yes.

Q. They are located in San Francisco?

A. Yes.

Q. And Glaser is located in San Francisco?

A. Yes. [84]

Q. Could you explain, Mr. Patriarca, since you have come from Providence, Rhode Island, about three thousand miles away, you have come all the way across the country to sue someone on a patent,

(Testimony of Domenico Patriarca.)

why is it that you have sued Melvin Sosnick Company, a cigar wholesaler, instead of the manufacturer Rubinfeld Showcase Company? [85]

* * * * *

A. I came about January 15th of last year or thereabout. It [87] might be a few days before or after. I came to San Francisco because I was informed that Sosnick Company was selling cases similar to mine. I came over here and I saw three installations with my own eyes. I was satisfied there was an exact infringement, at least in my own mind. I told my attorney to advise them. They first stalled as long as they could, and then practically told us we didn't have no patent, no leg to stand on, so they are going right ahead and do what they want. At least that is the way I understood it.

Q. (By the Court): Do you have anything to say about why you have not, if you have not, sued the Rubinfeld Showcase Company?

A. Well, I felt that if we sue one, and if I had to go and sue Rubinfeld, I had to go to Los Angeles, and I don't intend to spend the rest of my days in court. I got a living to make. [88]

* * * * *

Q. (By Mr. Gregg): Mr. Patriarca, I direct your attention to a feature of the cigar showcase which you manufacture known as Plaintiff's Exhibit 5. I direct your attention to this slope.

The Court: You have to use a case or can you use the diagram up here?

(Testimony of Domenico Patriarca.)

Mr. Gregg: I can use the diagram, your Honor. I think that is a good idea.

Q. I direct your attention to Plaintiff's Exhibit 3, a large drawing of Design Patent 168,288, and I further direct your attention to the sloping lower front wall, to which I will apply the reference character X. What is the advantage of that lower sloping front wall.

A. Well, it has quite a few advantages. The first, it improves the symmetry, the balance, and does subdue the woodwork and bring out the display of merchandise.

Second, you can get close to it, much closer, to make your selection instead of kicking the woodwork. [89]

Q. Having regard to the change which was made in the cabinet that the Sosnicks have sold, namely, extending it back horizontally and then down vertically, would that improve your appearance and, I forget your phrase, something like subduing the wood? A. No.

Q. It would not?

A. I mean—excuse me—it does practically the same thing actually, because the display remained the same and you could still get close and the general appearance is still—

Q. Mr. Patriarca, apart from any pleasing design aspects of that lower sloping front wall, the only practical advantage is, is it not, that it just permits the customer to get closer and put his feet under the cabinet?

(Testimony of Domenico Patriarca.)

A. That is one of the features. [90]

* * * * *

Q. (By Mr. Gregg): If I can refresh your recollection, you apparently made your invention in September, 1951. I am not asking you to state that. That is in the record. A. Yes, 1951.

Q. I am speaking about prior to that time, and prior to the time that you got into production on this type of case you sold a negligible amount of cigar showcases?

A. Yes, I would say in the neighborhood of fifteen through the balance of 1951 and 1952 and in the year 1950.

Q. I thought, Mr. Patriarca, that you had been in the showcase business, including the cigar showcase business, for about 35 years.

A. That is correct.

Q. During those 35 years up until about 1951 you sold only ten or fifteen showcases?

A. That is correct.

Q. Not very much business then.

A. No, I wouldn't say that. In other words, we used to do a general store fixture work, and when we built the store, we included the cigar cases.

Q. Altogether prior to 1951 in your 35 years of experience [92] you had sold only about ten or fifteen cigar showcases? A. Yes.

Q. You testified, I believe, you had sold since you came out with the self-service cigar showcase about 4,000 of them, sold them throughout the country? A. Yes.

(Testimony of Domenico Patriarca.)

Q. You know how many cigar showcases there are in the United States? A. No.

Q. Do you know how many cigar retailers there are in the United States?

A. I used to know at one time.

Q. I have heard the figure of 2,000,000. Does that sound out of line? A. How many?

Q. 2,000,000 cigar retailers?

A. It could be that many. I don't think there were that many but it is a large amount.

Q. Since 1951 to date, a period of about six years, you have sold 4,000 cigar showcases; you have sold to certainly not in excess of 4,000 cigar retailers, is that correct? Some of them might have bought two showcases, is that correct?

A. There might—a few people, they might have bought them all in one.

Q. Do you know anything about the sale, and I am speaking now, [93] Mr. Patriarca, of the period 1951 to the present time, do you know how many cigar showcases have been sold during that period by your competitors throughout the country?

A. No.

Q. You do not. They might have sold a great many more than you?

A. I don't believe so.

Q. You do not think that throughout the country more than 4,000 cigar showcases have been sold in the last six years.

A. At the least I don't think so.

Q. I would like to ask you a few questions, Mr.

(Testimony of Domenico Patriarca.)

Patriarca, with regard to a list of concerns which according to your testimony at one time were imitating your cigar showcases, but they have mended their ways since. I refer to Exhibit 12, McKesson-Robbins, No. 1 on the list, do they sell locally in San Francisco? A. Yes.

Q. With regard to McKesson-Robbins, do you know whether they sell any other cigar showcases than the Patriarca? A. I don't think so.

Q. You do not believe so but you do not know?

A. I wouldn't swear to it.

Q. With regard to the Bowman Corporation of Grand Rapids, Michigan, according to the exhibit, they stopped the infringing and now sell the Patriarca humidor? [94] A. Yes.

Q. Do you know whether Bowman sells any other line of cigar showcases?

A. To the best of my knowledge not.

Q. But you do not know for sure?

A. I have not——

Q. What is the Bowman Corporation?

A. It is a national fixture house.

Q. It is a fixture concern?

A. A fixture concern, yes.

Q. The Wilkinson Company No. 3, what business are they in?

A. Same thing, the fixture business.

Q. Do you know whether they sell any other showcases than the Patriarca humidor?

A. I don't know, to be frank with you. They might build some other type of case themselves, but

(Testimony of Domenico Patriarca.)

when it come to that type of case they buy from us.

Q. Here is one close to home, United Fixtures, Providence, Rhode Island, Wilkinson was also in Providence? A. Yes.

Q. What about them? Do they sell any other line?

A. They do not sell any other line, but I don't say they might not make a conventional case now and then if it is required.

Q. You think they might sell some of their own manufacture? [95]

A. Yes, but not the same type of a case because there wouldn't be any sense for them to buy from us.

Q. No. 8 on the list, Plaintiff's Exhibit 12, was the Royal Showcase of San Francisco. Is it your position that they were notified of infringement and stopped manufacturing?

A. To the best of my knowledge I would say they did stop. They promised to stop.

Q. Do they put out any other type of showcase?

A. I imagine they do. They make other types of cases and they make a conventional cigar case. I mean I assume.

Q. Do you know whether they put out some showcases of the type we are looking at, to my right and to the Court's left, which is Defendant's Exhibit A?

A. I have seen the case there. I don't know whether it is manufactured by the Royal Showcase.

(Testimony of Domenico Patriarca.)

Q. You do not know whether Royal Showcase manufacturers that? A. No.

Q. Do you know the Madison Drug Company?

A. Madison Drug?

Q. Madison Drug Company.

A. In San Francisco?

Q. I don't know where they are located. I just have the name Madison Drug Company.

A. I don't recall.

Q. Do you know a J. B. Withers in Atlanta, Georgia? [96] A. Withers? Yes.

Q. Do they ever put out a case like yours?

A. To be perfectly frank, I haven't seen the case they put out. I understood they did put a case out like ours. We had a talk with DeWitts of the main branch and they seemed to agree that they would undertake to sell our case. A lot of the branches they do sell our case. I wouldn't say that all branches sell their cases or they sell our case, but a lot of them, DeWitt's branch, which is part of this Withers.

Q. How about the H. W. Shore Company of Wooster, Massachusetts?

A. H. W. Shore, they came out with a case similar to ours. We notified them and to the best of my knowledge, since we notified them, one of their branches, which I should say is about 35 to 40 miles away—it might be 50—which is the New Haven branch, has sold more cases during that time than any other previous time before.

(Testimony of Domenico Patriarca.)

Q. What are they selling now, do you know?

A. They are selling our case.

Q. Your case? A. Yes.

Q. And no other?

A. Well, now, that I am not sure.

Q. Did you ever notify them of an infringement?
A. Yes. [97]

Q. They are not on this list, Plaintiff's Exhibit 12, are they? I will hand it to you.

A. I thought I had it. Yes.

Q. Where is it? A. H. E. Shore.

Q. H. E. Shore? A. Yes.

Q. Perhaps that is the source of confusion. I understood the name was Shaw. The name is Shore, is that correct?
A. Yes.

Mr. Gregg: I think that is all, your Honor.

The Court: Mr. Mellin, how much longer will your redirect be?

Mr. Mellin: Two or three minutes.

The Court: Go right ahead.

Mr. Mellin: Your Honor, I have in front of me the remainder of the correspondence regarding this Rubinfeld matter, including a copy of the letter that was sent us, inasmuch as this was our correspondence from Elliot A. Salter, who is of Frucht and Salter, patent lawyers, Providence, Rhode Island, and a letter from the attorneys for Rubin-

(Testimony of Domenico Patriarca.)

feld of April 10, 1956, a copy of the letter being from Rubinfeld's attorney dated January 8, 1956. May I offer the documents to complete the correspondence in this matter?

The Court: Has counsel seen it yet? [98]

Mr. Mellin: Yes. That completes the correspondence.

The Court: As one exhibit?

Mr. Mellin: As one exhibit.

Mr. Gregg: If it please the Court, I wonder if we could stipulate that there is one exhibit which is a letter from——

Mr. Mellin: Sidney R. Rose of Flam, Valensi & Rose, who are the attorneys for Rubinfeld.

Mr. Gregg: No, I am mistaken about that. Go right ahead.

Mr. Mellin: These show that even on April 10, 1956, the time when Rubinfeld, after they made the change, they still said they did not infringe. That was long after the filing of this suit.

The Court: These three letters will be marked Plaintiff's Exhibit 15. Proceed.

(The correspondence referred to was thereupon received in evidence and marked as Plaintiff's Exhibit 15.)

[See Book of Exhibits.]

Redirect Examination

Q. (By Mr. Mellin): Mr. Patriarca, do you have any interest in any cigar business as such?

(Testimony of Domenico Patriarca.)

A. None whatsoever.

Q. Does any of your associates have any, such as Mr. Cameron? A. None whatsoever.

Q. Do you have any interest whatsoever in the cigar business of Glaser or his associate companies?

A. None whatsoever. [99]

Q. In other words, as I understand it, your only business is selling cigar cases?

A. That is correct.

Q. To clear up apparently what was confusing you this morning, I think, Mr. Patriarca, if you take these steps, or just ordinary steps, such as in the case of Mr. Gregg out of your case and put them in some of the commonplace, heretofore used cases, that was done before you made your invention, wasn't it?

A. As far as the steps, I think as a whole, that is as old as man himself because we use steps to climb stairs.

Q. That is also true of cabinets that permit somebody to serve themselves? You did not invent that particular principle? A. No.

Mr. Mellin: That is all.

Mr. Gregg: No questions, your Honor.

The Court: Will you step down?

(Recess)

Mr. Mellin: We will call Mr. Glaser.

The Court: Mr. Glaser, step forward and be sworn, please.

MARCUS GLASER

was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

The Court: Before you start examining this witness I might [100] say to both counsel that I am personally acquainted with this witness and have known him for a number of years. However, I have no business relations with him or anything of that sort. I want both counsel to be advised. I know Mr. Glaser and have known him for a number of years.

Direct Examination

Q. (By Mr. Mellin): State your full name for the Court and the record.

A. Marcus Glaser.

Q. Your age? A. 57.

Q. And your residence address?

A. 1100 Sacramento Street.

Q. What is your occupation?

A. President, Glaser Brothers.

Q. Do you also have another company?

A. Yes, sir.

Q. What is the business of Glaser Brothers?

A. The business of Glaser Brothers is whole-sale cigars, tobacco and cigarettes.

Q. What is the name of the other company?

A. We have many other companies. The other company you are referring to is the Frawley Tobacco Company.

(Testimony of Marcus Glaser.)

Q. You are for all practical purposes the Frawley Company, a tobacco concern?

A. Yes, sir. [101]

Q. How long have you been in business?

A. All my life.

Q. You are active and have been active for many years in that business? A. Yes.

Q. Over what territory do you distribute cigars?

A. The states of Oregon, Nevada, Washington and part of Idaho.

Q. How long have you been distributing cigars over that area?

A. Practically speaking, we have been in business since 1888. We have been in California in the City of San Francisco since that time. Our first branch was in 1912. We expanded in 1919 out of state for the first time, and from there on we grew.

Q. Is one of your companies the distributor of plaintiff's humidors? A. Yes, sir.

Q. For how long?

A. I think since 1953, if I am not mistaken.

Q. And those cabinets I refer to, they are like or unlike Exhibit 5?

A. This is the cabinet, Exhibit 5.

Q. How did you happen to become the distributor of this cabinet?

A. I was in the tobacco convention at Atlantic City, and in walking through some of the exhibits I came across this [102] particular cabinet. To me it represented the acme in cigar display and distribution, ability to keep the cigars moving, the

(Testimony of Marcus Glaser.)

cure-all—it was a cure-all for the cigar business, as I saw it, from the standpoint of consumer display and sales. I met a Mr. Cameron there and asked him how much the case was. He told me and I told him I didn't think anybody could see a cigar case for that price. I said, however, I would like to talk to you about it.

Mr. Cameron afterwards came out to see me and we took the cigar case on through the Frawley Tobacco Company, not through Glaser Brothers.

Q. And they sell the case actually to the retailers?

A. The case is sold—Glaser Brothers is not in the fixture business. We are in the cigar, tobacco and candy business. When it comes to fixtures or anything that requires any length of time, we try to divorce it from the regular Glaser Brothers setup. So we put this in the Frawley Tobacco Company, which allowed them to sell to everybody.

Q. Then you have been selling these Patriarca patented cabinets since about 1953, did you say?

A. Yes, sir.

Q. Did you cause a compilation of the sales, both in numbers of cabinets and in dealer value, to be made up for you?

A. Yes, sir.

Q. I hand you such a recap or compilation and ask you if that [103] is it?

A. This is it.

Q. And that shows the total sales by your company since that time of \$265,314.95; that is correct, is it?

A. Yes, sir.

(Testimony of Marcus Glaser.)

Mr. Mellin: I will offer that recap and the sales, your Honor.

The Court: Plaintiff's Exhibit 16.

(The recap referred to was thereupon received in evidence and marked Plaintiff's Exhibit 16.)

[See Book of Exhibits.]

Q. (By Mr. Mellin): Prior to the time that you became the distributor of this Patriarca display humidor, what had been your experience with reference to humidors, of this kind for this purpose?

A. Well, I have been in the cigar business practically speaking working at it since 1917, working both for the manufacturer as a peddler, distributing as a peddler, and also working for Glaser Brothers, and the problem in the industry was always to get a case that would do three of four functions. Where you could always get two or three you couldn't get a fourth one. No matter what you did there was always something missing. When I saw this case I decided that it had everything that was asked for. I had tried to sell—I built cases before. I have gone to special shops and ordered cases for dealers, had them built, I talked to display men and tried to fool around [104] with the cases to see what could be done, but none of the cases answered exactly the problem of this industry, and when I saw this Patriarca case I thought we had hit the jackpot on it.

Q. Do you know whether or not the sale of the cases that you had made have increased or decreased the sale of cigars in your area?

(Testimony of Marcus Glaser.)

A. I can't say positively that we have increased the sale of cigars in our area through the sale of cigar cases, but I would say our sales have increased perceptibly since 1953. I can say that we sell this case under a rigid guarantee to the dealer. It is verbal but it is still a guarantee, that any time a dealer puts it in and he can't show a 30 per cent increase in his business, in a cigar department, if he places it correctly, according to what we ask, we will give him the case.

Q. Can you state whether or not those to whom you have sold cases have increased their cigar sales?

A. Our comparative figures showed an increase of about 51 per cent.

Q. From your records you are able to determine this, were you? A. Yes, sir.

Q. How did you do this?

A. I had one of our auditors, I had our head auditor take off a three month period, before and after, and we produced the figures based on 25 per cent of the cases we sold in the year [105] 1955.

Q. In other words, you picked all the sales of cases during a certain period?

A. During a certain period.

Q. And then checked those against the cigar sales to the retailer prior to and subsequent to that time? A. Yes, sir.

Q. I hand you a compilation which is entitled "Comparative Value of Cigars Delivered to Patriarca Purchasers." Is that the compilation you refer to? A. Yes, sir.

(Testimony of Marcus Glaser.)

Q. That you had your auditor make?

A. Yes, sir.

Q. And that shows an average increase to all of those to what extent? A. 51.63.

Mr. Mellin: I will offer that in evidence, your Honor, as next in order.

(The compilation referred to was thereupon received in evidence and marked Plaintiff's Exhibit 17.)

[See Book of Exhibits.]

Q. (By Mr. Mellin): As I understand it, from the evidence that has gone in from you, you have sold something over 600 cases in this area in which you deal over the past three or four years. Do you know of any instance, Mr. Glaser, in which the installation of the Patriarca case failed to increase the [106] retail sale of cigars?

A. I do not know of any instance where it failed to increase. There are some cases on record there where it was only 12 or 18 per cent, and we have studied the matter over, went down to the dealer, and by moving the case around and putting it in a more vulnerable position to display, we have brought that back up to where it should have been.

Q. What were the shortcomings of these prior cases that you have spoken of, that you said they had prior to this Patriarca case?

A. A cigar case must have a few advantages that are not given lightly to anybody. Number one, cigar business is not what you would call an increasing business in today's economy, though it

(Testimony of Marcus Glaser.)

shows an increase of two per cent over-all. In 1933, which was a slow point, there were four billion cigars sold; today there is six billion five hundred million. That is the 1956 figures. And one of the reasons for it is a lack of proper display in show-cases and the lack of proper conditioning for cigars. If a cigar is dry, you not only lose a customer for your cigar but you lose a customer for the business. It is bitter, it is harsh, it doesn't smoke properly. If a cigar is fresh and in good condition it tastes and smells sweet, smells like tobacco, doesn't have the harsh odor. A cigar must be fresh. Not only that, the average case we have seen up to this point—— [107]

Q. By "up to this point" what do you mean?

A. Up to the point I have seen this Patriarca case, the average case we had seen and the ones I have built even—and I think I have built a great many cases—and by many, 100, let us call it that, for round numbers—we found the space that it took up was so great you couldn't get adequate display, and at the same time produce and keep a fresh humidification of cigars, and keep the cigar either from becoming too fresh and getting soggy, as we call it, with a mold on it, or becoming dry.

The average cigar box is one foot—approximately you must allow one foot in a case for a cigar box as an average. To put 50 boxes in a case, or 40 boxes, as you see there, would require in this case about 6 and a half or 7 feet. I don't know the exact measurement, but that is approximately what it is. To do

(Testimony of Marcus Glaser.)

it in a regulation case of 3 steps or a regulation case that had been built in the past without the mass display and the functional use of this case, which this design alone gives, a mass impression, which is today's modern merchandising, mass impression without giving this you lose the effectiveness by spreading it out. A man sees nothing.

Then in addition to this, if it is not so located, it does not strike the eye when it comes in, if it is not built up so people can see, if it hasn't the attractiveness to make a man want to buy, you lose a cigar sale, because most of cigar sales [108] are what you call point of sale purchases. Now, this case answered all of those problems, as I saw it. Not only that, it answered the most difficult problem of all. When the dealer bought a quantity of cigars, where was he going to put them? What was he going to do with them? Stick them in the back and then put them in the case when they are all dry? He would put them underneath of the case. The case was humidified. The case was in good condition. All cigars taste fresh. Everything about the case was clean. In addition he could lock the case at night time if he wanted to. He could do many things with it. And we increased high grade cigar business 25 per cent above the national average since 1953, and I attribute a great deal of it to the Patriarca case.

Q. Have you ever seen a case like this before?

A. Yes, sir.

Q. You have seen a case?

(Testimony of Marcus Glaser.)

A. What case?

Q. What case?

A. The one standing over there?

Q. I mean prior to the time you saw the Patriarca case.

A. I have never seen in my time in the cigar business, I had never seen an identical case to this case, or what I would consider, instead of identical, if I may use the word similar—I have never even seen a similar case. Though many people have tried to make displays, this man created something that [109] could be—, anybody could imitate it, sure, because since the four-minute mile was broken, there have been other guys who have broken it. Since you broke the sound barrier, others have broken it. But one man had to come into this industry and give us the background and give us a case that looked to be like this.

Q. From the sale of the case itself do you make much of a profit?

A. We make practically no profit.

Q. Why do you still distribute them?

A. Because they increase the sale of cigars. They help the cigar business. They are good for the cigar business, and what is good for the cigar business is good for this company.

Q. When the Frawley Company, or whatever company sells these cases, sells them to customers, is it your practice to give away free cigars to put in the case?

A. We don't give away anything. We made ar-

(Testimony of Marcus Glaser.)

rangements with the manufacturers with whom we do business, and some with whom we do not do business. Where we do business with the manufacturer, we go in and give the man, to help him reduce the cost of that case, because it is a very expensive case for a little retailer to put in—it is three, four, five or six hundred dollars—this is an expensive case, it isn't cheap—we make arrangements with the manufacturer, who is given the privilege of putting in free cigars in a man's case. At the same time we do this we notify other manufacturers. At one [110] point they used to let us put their own cigars in. Later they felt they were losing something. They weren't able to go around and say, "We gave it to you instead of Glaser Brothers." It isn't our franchise brand. So they went around and gave it to the dealer themselves. The manufacturers are notified and they make arrangements to give whatever cigars they want in those cases.

Q. Is that sort of arrangement unusual in the cigar business?

A. In our particular case anything could be unusual, but in the sale of Patriarca cases throughout the East it was recommended by the Cigar Institute of America of which I am a member. It is in conjunction with the Cigar Manufacturers Association, and they give, wherever Patriarca puts in a case, they give a certain amount of free goods to the retailer in the cases. It is an effort to get the dealer to take a further interest in selling fresh cigars, well displayed and well humidified.

(Testimony of Marcus Glaser.)

Q. What sort of discount does that give the purchaser of one of these cases presently?

A. I think that the facts will speak for themselves. It isn't a discount. We have a schedule and everybody knows the schedule. It is open; isn't closed. That schedule is open to everybody.

Q. Even with the value of the cigars given away does that case still cost the retailer more than the Sosnick case or not to [111] your knowledge?

A. To the best of my knowledge a great deal more, sir, and the dealer pays money for it.

Q. In any instance do you require when you sell one of these cases to the retailer that they display only your brands or the brands that you are handling?

A. This case is sold with the understanding that it is the dealer's property. We ask him and we get, because we have installed this in usual manners, we say, "Please give us 30 to 60 days, leave our cigars there, see how they sell, and if they don't sell we'll pick them up and take them back." Once a man buys that case it is his. He can say, "I am sorry but there is nothing we can do about it." There is nothing in the conditional sales contract that requires him to display our cigars.

Q. Did you ever require it to your knowledge?

A. No, to the best of my knowledge, and if I found anybody who did I would dismiss him from the organization.

Q. Did you ever offer to sell these cases to the defendant Sosnick?

(Testimony of Marcus Glaser.)

A. I have offered to sell that case to Mr. Melvin Sosnick. I have tried to sell that case to every distributor on the West Coast. I have made it public that I would do so. But I personally have told that to Mr. Sosnick myself.

Mr. Mellin: Your witness. [112]

The Court: Cross examine.

Mr. Gregg: Your Honor, I would like to file the deposition of Mr. Glaser taken last week. Mr. Mellin, may we have the same stipulation?

Mr. Mellin: Certainly.

The Court: The deposition may be filed.

Mr. Mellin: Before he commences may I ask one question?

The Court: Yes.

Q. (By Mr. Mellin): Did you ever advertise this humidor, this Patriarca humidor?

A. What do you mean advertise it?

Q. Did you advertise it ever?

A. Certainly, I have spent money on it.

Q. How much?

A. I don't know. We give away two or three cases a year. Last year I gave a case to the retail liquor dealers in San Diego, I gave one away to the retail grocers. We give away one to the retail druggists association.

Q. At conventions?

A. At conventions as door prizes.

Q. Do you advertise in journals and things of that sort? A. No.

Mr. Mellin: That is all.

(Testimony of Marcus Glaser.)

Cross Examination

Q. (By Mr. Gregg): Mr. Glaser, you are the exclusive representative throughout [113] the states of California, Oregon, and Washington of Patriarca Manufacturing Company, aren't you?

A. After a fashion.

Q. Will you qualify that and explain the qualification?

A. The McKesson Drug Company also have that case. They sell it along with their fixture account. Just lately here one of the fixture people wanted a case and it was sold to them.

Q. But most of the Patriarca cases sold in those three states are sold through the Frawley Tobacco Company?

A. Yes, sir.

Q. You own the Frawley Tobacco Company?

A. Yes, sir.

Q. And you also own the Glaser Brothers?

A. Yes, sir.

Q. In Plaintiff's Exhibit 16, for the period 1953 through 1956, a period of four years, the total sales of cigar cases amounted to \$265,314.95; you may check me if you wish.

A. Whatever the paper says, it speaks for itself.

Q. Proportionately about how does that compare with the dollar volume of cigar sales of Glaser Brothers?

A. I don't think it is relevant.

Q. Could you answer that?

A. I don't see why I should.

(Testimony of Marcus Glaser.)

Q. No objection has been made.

Mr. Mellin: I will object. What difference does it make [114] how many cigars he sells? That is not an issue here. What is the total sales of cigars?

The Court: Is that what you are after?

Mr. Gregg: I do not care about the total sales of cigars. I want the ratio between the dollar volume of showcase sales, the dollar volume of cigars as against the dollar volume of showcase sales.

Mr. Mellin: That is like comparing bananas with chickens.

The Court: What is the relevancy?

Mr. Gregg: The relevance is this: We believe the motive in filing this suit is to protect the sale of cigars and not the sale of showcases.

Mr. Mellin: If your Honor please, if he wants to know the number of cigars sold here, we have given the value on that list.

The Court: I understand. Can you give that ratio, Mr. Glaser?

The Witness: Will you restate your question?

The Court: He wants to know the ratio of dollar volume of cigars to the dollar volume of sales.

Mr. Gregg: For the period indicated, 1953 through 1956.

The Witness: Well, I am here to help Mr. Patriarca in this suit. As long as you have asked the question, I will give the answer. I can't give it to you in percentage. I don't know. But our cigar volume represents somewhere between 17 and 20 mil-

(Testimony of Marcus Glaser.)

lion dollars. [115] The exact figure I refuse to give you. I think that is satisfactory.

Q. (By Mr. Gregg): That is sufficient. Your main purpose in selling the Patriarca showcases is to stimulate the sale of cigars, is that correct?

A. Yes, sir.

Q. In the states of California, Oregon and Washington Glaser Brothers is the dominant and largest cigar wholesaler, is that correct?

A. I wouldn't say that 100 per cent.

Q. Well, let us take California.

A. In the State of California we are the largest cigar distributors all over the state, though there are locations where other people are stronger than we are.

Q. What about San Francisco? What is your relative position?

A. I don't know what anybody else is doing, so anything I would say would be a matter of conjecture.

Q. What would be your conjecture with regard to San Francisco, your relative position in the sale of cigars?

A. I think we are number one. We are supposed to be number one in the United States, if that will answer all your questions on that subject.

Q. That is sufficient. A. All right.

Q. It is a fact, isn't it, Mr. Glaser, in the last few years [116] there has been a great deal of advertising, national advertising by the cigar industry and by some of the companies in the cigar

(Testimony of Marcus Glaser.)

industry; by "national advertising" I refer to TV and other forms of nationwide advertising, isn't that correct? A. I suppose so.

Q. Don't you know?

A. I don't know. Do you?

Q. You asked me the question. I see it on the fight programs. A. That's right.

Q. They advertise Santa Fe cigars, isn't that right?

The Court: It is a rather indefinite question. I think that is what Mr. Glaser is referring to. Counsel, I do not want this to get into an argumentative proposition between you and the witness and, Mr. Glaser, you answer the questions and don't question counsel.

The Witness: Yes, sir. All right, sir.

Q. (By Mr. Gregg): To what extent have increased cigar sales, as shown by Plaintiff's Exhibit 17—I will hand you my copy of that—to what extent would you say increased cigar sales have been due to national advertising of cigars?

A. Well, if I may digress to answer that, in the cigar business the total increased sales for last year was approximately two per cent. This took in all facets of the industry. The increased sale on the West Coast has been thrown slightly out of kilter, and the relative position of its increase has [117] been thrown out of kilter because of the tremendous influx of population for which allowances cannot be made because we are not close enough up with them. So if we have increases here that are

(Testimony of Marcus Glaser.)

far greater than the national average—and we have—some of it must be given to this influx of population. Some of it must be given to the fact that we have a greater cigar-smoking public in the West than we have in the South. It is axiomatic in the business that the higher the wage scale the more cigars are smoked. It is also axiomatic in the business that the more people who are in the fresh air smoke cigars than those who are in closed offices. This is part of a picture. I cannot give you the exact total. I don't know. But Glaser Brothers—and these cases have shown remarkable improvement over and above our own increase. Well, we have increased perceptibly in our business, and these cases, where they have been put, have increased greater than Glaser Brothers increase. I hope that will answer your question.

Q. Mr. Glaser, with regard to the locations where Patriarca showcases have been installed, and according to the data set forth in Plaintiff's Exhibit 17, comparing the prior 90 day period with the subsequent 90 day period, in those cases I would like you to shed some light and information on this question: Was there any change in the brands of cigars displayed before and after the commencing of the test period?

Mr. Mellin: Change in brands? [118]

Mr. Gregg: Change in brands?

Q. Take, for example, to pin point it, the first item in Plaintiff's Exhibit 17 is for San Francisco. The period is the 2nd of June to the 1st of Au-

(Testimony of Marcus Glaser.)

gust. There were three units installed. Prior to the time they were installed, if I am interpreting this document correctly, prior to the time they were installed \$1,173.75 worth of cigars were sold. During the 90 days after the case was installed \$2,035.81 worth of cigars was sold. In those particular instances, in San Francisco, three units—and I will hand you my copy of the exhibit—were there any changes in the brands of cigars?

A. Let me answer it to the best of my ability this way. Since 1951—since 1950 we have not added a new brand except a nickel brand, which is inconsequential with us. We haven't added a new brand in our distribution scheme of our cigar business to the best of my knowledge—to the best of my knowledge.

Q. By the way of digression, Mr. Glaser, is there a nickel cigar that is worth smoking?

A. Yes, there is a very good cigar. I will recommend it to you. Forty-fours. Can I get the plug in?

Q. I am not concerned, Mr. Glaser, about whether Glaser Brothers has changed its brand of cigars. What I am concerned about, to pin point it, with respect to the first item on Plaintiff's Exhibit—— [119]

The Court: I gather what you want to know is whether there was a change of brand in so far as these particular brands are concerned.

The Witness: To the best of my knowledge, no.

Q. (By Mr. Gregg): You do not know really whether the brands were changed.

(Testimony of Marcus Glaser.)

A. I would say I would be surprised if they were.

Q. Were the brands your own brands or were they the brands of other wholesalers or a mixture of brands?

A. I don't know what you——

Q. Take the three units in San Francisco.

A. Just a minute, please. I am not trying to argue here, be argumentative with this. We have 150 salesmen, or 180, to be exact. We have 35,000 accounts. Now, if you want me to sit up here and pin point three accounts in San Francisco, I am going to tell you I can't do it. But I am going to tell you the cases have held approximately the same displays before and after. I think that our records are accurate, because we try to keep them accurately. We don't try to hide nor do we try to cheat with them. I would assume what we had before is the same as we have afterwards.

Q. But that is simply an assumption; you do not know it to be a fact?

A. I cannot swear to it under oath.

Q. You have been personally connected with the cigar business [120] in San Francisco for a good many years, is that right, Mr. Glaser?

A. Yes, sir.

Q. Do you know of the Royal Showcase Company in San Francisco? A. Yes, sir.

Q. Do you know of the Regal Manufacturing Company in San Francisco? May I mention the

(Testimony of Marcus Glaser.)

name of Henry Cohen, who I understand is the owner of Regal Manufacturing Company.

A. I might. I don't recall just this minute.

Q. During your long connection with the cigar business in San Francisco has it ever come to your attention that Royal Showcase has manufactured a self-service type of cigar showcase?

A. Yes, sir.

Q. When did it come to your attention first?

A. Well, we put out the Royal Showcase—the Royal Showcase has made many kinds of self-service cases, and you are using a very bad misnomer, if you will pardon the correction, Counsel. I don't mean to be facetious on this. The word "self-service" on that case is a name somebody conjured. This is to my way of thinking. There have been many kinds of display cases built, but not until Patriarca built that case, with that particular identification of the display en masse, not until he was able to break down every theory that this business has ever had according to how a case should be built and displayed, not until then had I ever seen a case that looked like that, [121] although I will say the Royal Showcase duplicated that case sometime later, and I have had the privilege of *bringing* their owner. At that time he was semi-retired, Mr. Hoffman. I told Mr. Hoffman, "What is the idea of trying to break into a man's patent?" and he told me he would stop making that particular imitation.

Q. Mr. Glaser, you seemed satisfied with my

(Testimony of Marcus Glaser.)

term "self-service showcase." You give it any name you wish. I have heard the phrase "old-fashioned" showcase used by Mr. Patriarca himself.

A. All right. Call it old-fashioned.

Q. What was the old-fashioned showcase? What made it unsatisfactory?

A. It did not perform all the services that a good case should perform under those merchandising.

Q. What are those?

A. It should have mass display in a very, very small space, the smallest space possible. You should have mass display. You should have complete identification of the boxes so that when a man walks up to them he can see them. It should have the ability to keep the cigars fresh. It should have the ability to store cigars and keep them fresh, the six or five, whatever I have reached there (demonstrating). The top of it should be such that the dealer can't crowd it with a lot of gums, toys, flags and boxes so that the man can't see the cigars below. [122]

Q. In other words, when you supply an account with a cigar showcase, you are interested in selling cigars and not chewing gum.

A. I am interested in our selling chewing gum and candy as much as I am interested in cigars, but there is a place for everything, and what we try to do, and what we have spent most of our money in doing—not most of it but a great deal of it—but the one reason we have grown is we

(Testimony of Marcus Glaser.)

have taken an interest in how the dealer merchandises, and we have spent our money on displays and cases to help him merchandise.

Q. Then I take it, Mr. Glaser, it is the policy and the philosophy of your business that you do not sell to some account a showcase; you teach him how to merchandise cigars?

A. To the best of our ability.

Q. To the best of your ability, and you have been very successful at that?

A. Well, some people think so.

Q. In connection with the five, six, or how many services which a cigar showcase should perform, I am not sure I can remember them all, Mr. Glaser, but I do recall one of them you said was accommodating a great deal of merchandise in a small area, is that correct?

A. Yes.

Q. How is that accomplished in connection with the showcase [123] which is Plaintiff's Exhibit 5, which is the showcase here (indicating)?

A. May I come down?

(The witness approached the showcase referred to.)

Can you see that all right, Judge?

The Court: Yes, I can see it.

The Witness: When a man walks up to this case, you are now looking at 40 boxes of cigars in one shot. This gives him an adequacy of looking at what he wants to buy, and gives him his choice of sizes and shapes. It also gives him the feeling that this is not a junky piece of furniture lying

(Testimony of Marcus Glaser.)

there. A man can walk straight across this counter, pull open that door, and he has a fresh cigar.

Q. Is that the step you accomplish?

A. No, it is the over-all design, the picture of that case, the look of that case. It is something that has never been produced in this business before. I have never seen it in the cigar business.

Q. Mr. Glaser——

A. Pardon me if I get excited, but cigars are my business.

Q. Mr. Glaser, I am very sorry.

A. I didn't mean——

Q. That is all right. I do that myself. I do not know much about cigar merchandising, but I would like to focus attention——

A. There is nothing specific about the case except the over-all structure of it, the over-all feel of it, the over-all tone of it. Everything about it is good, and this is the first time this was conceived.

Q. Let us talk about humidification, Mr. Glaser. You mentioned——possibly you mentioned this on your direct examination—that one step was to keep the cigars fresh and humidified. A. Yes.

Q. I will agree with you that there is nothing worse than a dry, stale cigar.

A. May I offer you a fresh one?

Q. Thank you. It won't persuade me, but thank you. What is there about the Patriarca self-serving showcase which makes the humidification efficient?

A. The humidifier in the back throws off the moisture, and I am not a humidification expert.

(Testimony of Marcus Glaser.)

This I know nothing about except for the fact that in the buildings we have built we have spent in San Francisco about \$15,000 or \$20,000 to build a cigar display room. In Los Angeles—a cigar humidifier room. In Los Angeles we spent about \$18,000 or \$19,000 to build one. I called in the best people I knew and told them to build me what was necessary according to specification for a humidor along these lines we built it. All I know is in the desert we put this case on a test trial in Brawley. I stood it in the middle of the street. It lay there. The cigars [125] bleached, yes, but they stayed fresh. We tried everything we could. I put it in Southern California where we had to do everything in the world at some of those hot spots to keep the cigars fresh, and we have managed to do it, because fresh cigars is the thing that is going to bring the cigars back to life, and this case is the only case I have ever seen that will give us a fresh cigar.

Q. What precisely is there about that case that makes the cigars so fresh?

A. What is there about a beautiful woman that gives her class? I don't know. The whole design of the case—I can't tell you—I am not a humidification expert, Mr. Gregg. I do not know anything else except selling cigars and how to do it and what we have to do. When we put a case like this in, we aren't always sure in a man's store it is right. So we have a man stand there for two or three days at times, if we aren't sure, and we pay

(Testimony of Marcus Glaser.)

him to stand there to do this job because we want everything to be as it should be. We know the over-all contour of this case, the look of it. Look yourself. Look, that is what a cigar case used to be. This is what a cigar case is. Look yourself, look at the over-all picture of this case. This is a creation.

Q. Mr. Glaser, you mentioned one of the functions to be served by a cigar showcase was to insure that each and every box of cigars in that case was equally displayed? [126] A. Yes, sir.

Q. How was that achieved in connection with the showcase?

A. Look. Nothing is 100 per cent. Nothing is ever 100 per cent right. There always must be, even in Glaser Brothers, a margin for error. There is a margin for error even in living. So the men on both ends don't quite get the full shock that you get in the middle, but we try to give everybody who is in that case, whether our boxes or anybody else's, a full mass display, a compact display in depth.

Q. How is that accomplished?

A. By the case.

Q. Anything in particular?

A. Yes. By the looks of the case, by the steps, by the cut of it, by the jib of it, by the doors, by its construction, by the way it is handled, by the way it looks in a man's store, and by the fact that it is a beautiful piece of furniture, and we haven't

(Testimony of Marcus Glaser.)

seen anybody refuse to put it where we told them to do so.

Q. You may take the stand.

A. If I talk a little loud, it is my usual voice. Will you accept it as an apology?

Q. With regard to the cigar showcase which is here on the side of the courtroom, marked Defendant's Exhibit A, is it your opinion that none of the functions you have mentioned are served by that showcase? [127]

A. I would say it would hold cigars.

Q. You would say it would hold cigars?

A. I would say it couldn't—it couldn't produce humidification because the shelves are solid. If the shelves are solid and you put the humidifier behind the cigars—I wanted to see if the shelves were solid——

Q. That is correct. If they had holes in it, it would permit humidification?

A. It would permit some humidification, yes.

Q. Would it display the cigar boxes as effectively as the self-service showcase, Plaintiff's Exhibit 5?

A. Definitely not.

Q. Why not?

A. It hasn't the mass impact. You are looking at a case there. I don't know. I haven't seen it before, but it looks to me like that would hold about 18 cases. It will hold about 7 rows of 3, maybe 21 boxes, if it will hold that many. How many feet is it?

Q. I haven't measured it.

(Testimony of Marcus Glaser.)

Mr. Mellin: About 6 and a half feet.

Mr. Gregg: Plaintiff's Exhibit 5 is a bigger case, isn't it?

The Witness: Just a minute.

Mr. Gregg: I have a tape measure here if you want to measure it. [128]

The Witness: Six and a half. What is the width of that case?

Mr. Patriarca: The same width. Both cases are the same length.

The Witness: Both cases are the same length and the same width.

Q. (By Mr. Gregg): How about the height of the two cases? Plaintiff's Exhibit is considerably higher, is it not?

A. The height gives it some of that look. The height is what gives this thing—I told you, I think, Mr. Gregg, and this conforms to what I have said to you—that this case is not the length, it isn't the height, it isn't the width; it is the total construction, and the man who conceived it conceived something outside the ken of this business.

Q. Could we put it this way, that whatever the Patriarca self-service showcase has, it is an undefinable something or other that does the job?

A. No, it does not. You can see it.

Q. If it is not undefinable then you can define it.

A. The only reason I don't define it is I am

(Testimony of Marcus Glaser.)

not an expert. I do not intend to make some statement you are going to ask me and say, "you said this, or you said that," and I don't intend to run into it. If I am not an expert, I am not going to try to answer on an expert's subject. I have tried to answer to the best of my ability. [129]

Q. Do you know Melvin Sosnick?

A. Yes.

Q. Personally acquainted with him?

A. Yes.

Q. He is a vice-president of the NATD, is he not?

A. Yes.

Q. That is the National Association of Tobacco Distributors?

A. Yes, sir.

Q. A nation-wide organization?

A. Yes, sir.

Q. Is it somewhat of an honor and a matter of prestige to be vice-president of that association?

A. You could call it that.

Q. It is a fact also——

A. I may add I had the privilege of resigning from that honor.

Q. It is a fact, is it not, that Mr. Melvin Sosnick received the Alex Schwartz award last year?

A. I don't know.

Q. You do not know? A. No.

Mr. Gregg: That is all, your Honor.

The Court: Any further questions?

Mr. Mellin: No further questions.

ROBERT J. DELANEY

was called as a witness on behalf of the plaintiff, and being [130] first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Mellin): Mr. Delaney, will you give your name, age and residence address?

A. Robert J. Delaney, 3718 Taraval, 38.

Q. That is Taraval, San Francisco?

A. Yes.

Q. What is your occupation?

A. Manager of Glaser Brothers, San Francisco branch.

Q. How long have you been there approximately? A. Nine years.

Q. You helped bring this cabinet I had my hands on, Exhibit 10, into the courtroom this morning? A. Yes, sir.

Q. Where did you first see that cabinet?

A. At the Royal Liquor, 1400 Polk Street.

Q. What was the occasion?

A. I just went in and saw it. I talked to the man about his case.

Q. Did he tell you where he had obtained it?

A. Yes.

Q. Where?

A. He bought it from the Melvin Sosnick Company.

Q. How did you obtain it from him?

A. I traded one of my cases for that one, one of the [131] Patriarca cases for the Sosnick case.

Q. Exhibit 10? A. Exhibit 10, yes.

(Testimony of Robert J. Delaney.)

Q. Did anything else occur with respect to Sosnick and the case, between the man in the Royal liquor store—by the way what was his name?

A. Tindell.

Q. Do you have a note of it?

A. Yes, John H. Tindell.

Q. Was there something further you had to do with the Sosnick people before you could take the case?

A. Yes, he said he owed some money on the case. The amount I don't know.

Q. And he had to pay it off?

A. He did pay it off.

Q. And then you traded him the cases?

A. I did.

Q. And that is the exact case there?

A. Yes.

Mr. Mellin: That is all.

Cross-Examination

Q. (By Mr. Gregg): Mr. Delaney, you testified with regard to Plaintiff's Exhibit 10 that you obtained it from Royal Liquors? A. Yes.

Q. The gentleman's name was what? [132]

A. Tindell.

Q. You said that he told you that he obtained it from Melvin Sosnick Company?

A. Yes, sir.

Q. But you do not know of your own knowledge whether he did obtain it. You are simply taking his word for it, is that correct?

(Testimony of Robert J. Delaney.)

A. I am taking his word for it.

Mr. Gregg: That is all.

Redirect Examination

Q. (By Mr. Mellin): Was there more than one case of this character in his store?

A. No, sir, there was only one.

Mr. Mellin: That is all.

MARVIN SOSNICK

was called as a witness by the plaintiff under the provisions of Rule 43B of the Federal Rule of Civil Procedure, being first duly sworn, testified as follows:

The Court: You are calling him under the provisions of Rule 43B?

Mr. Mellin: Yes, your Honor.

Direct Examination

Q. (By Mr. Mellin): Will you give your name and your age and occupation, Mr. Sosnick?

A. Marvin Sosnick, 34, 49 Heather Avenue, San Francisco, [133] partner in the Melvin Sosnick Company.

Q. You active in the business of the defendant?

A. That is correct.

Q. You told me this morning that the defendant had sold a case such as Exhibit 10 to the Royal Liquor Store in San Francisco?

A. That is right.

(Testimony of Marvin Sosnick.)

Q. And that is the fact, isn't it?

A. That is right.

Mr. Mellin: That is all.

The Court: Any examination?

Mr. Gregg: No.

The Court: That is all.

Mr. Mellin: The plaintiff rests, your Honor. [134]

* * * * *

Mr. Gregg: Yes, your Honor. Before calling our first witness, I would like to offer in evidence two exhibits which have been marked for identification: Defense Exhibit B, which is a letter written by Mellin, Hanscom and Hursh, to the firm of Eckhoff and Slick; as Defendants' Exhibit C, which is a letter from Mr. Hursh to Rubinfeld Showcase Company.

The Court: These have not previously been marked for identification?

Mr. Gregg: They have been marked for identification, I believe, but not offered in evidence.

The Court: Oh, yes. They will be admitted into evidence, then, in accordance with the numbers with which they have been marked for identification.

(Whereupon Defendants' Exhibits B and C for identification were received in evidence.)

[See Book of Exhibits.]

The Court: What about Exhibit A?

Mr. Gregg: Exhibit A, your Honor, I am not ready at the present time to offer in evidence; but we will later. That is the physical exhibit, the showcase over here on the side.

Now, I would like to call as our first witness Mr. Claude L. Davincenzi.

CLAUDE L. DAVINCENZI

called as witness on behalf of the defendant, sworn.

The Clerk: State your full name for the Court and record.

A. Claude L. Davincenzi (D-a-v-i-n-c-e-n-z-i).

Direct Examination

Q. (By Mr. Gregg): Where do you reside, Mr. Davincenzi?

A. No. 2 Fair Oaks, San Francisco.

Q. What is your business?

A. I am a pharmacist.

Q. What is the name of the pharmacy with which you are connected?

A. Well, I operate the Central Drug Company, the parent company, which operates three drug-stores in the outer Mission in San Francisco.

Q. What are the three drugstores?

A. The Rex Drug Company at 4800 Mission, the Central Drug Company store at 4494 Mission, and the Golden State Pharmacy at 2450 San Bruno Avenue.

Q. Is the Central Drug Company a corporation?

A. It is.

Q. Are you an officer of that corporation?

A. I am.

Q. What is your business?

A. I am treasurer and buyer. [137]

(Testimony of Claude L. Davincenzi.)

Q. How long have you held the position of treasurer and buyer?

A. Well, for about two years. Previously I was president.

Q. You were president. How long have you been in charge of buying?

A. I have been in charge of buying since its existence, in 1919.

Q. In your buying, do you buy merchandise for the store?

A. Merchandise and everything that is purchased.

Q. You buy fixtures? A. I do.

Q. That are employed in the store?

A. That's right.

Q. Now at which of the drugstores is your office located?

A. At 4800 Mission, the Rex Drug Company.

Q. Speaking now of the Golden State Pharmacy at, I believe you testified it was, 2450 San Bruno,—is that correct? A. That's right.

Q. —in San Francisco, when did the Golden State Pharmacy first occupy the premises at which it is now located?

A. Well, I think it was in the neighborhood of 1940.

Q. Are you quite certain that it would have been prior to World War II or at least in the early stages of World War II?

A. It was before World War II.

Q. It was before World War II?

(Testimony of Claude L. Davincenzi.)

A. Maybe a year or so before, or maybe two years. [138]

Q. But you are certain it was before?

A. Absolutely.

Q. When the Golden State Drug Company moved into its quarters at 2450 San Bruno Avenue, was the building that you moved into a new building or an old building?

A. New building.

Q. It was a new building. It was the building put up specifically for your drugstore or for a drugstore?

A. Well, yes, it was. In fact, we had talked the owner into building the building for medical offices and a drugstore.

Q. And has the Golden State Pharmacy been at that location ever since you first occupied it?

A. Yes, it has.

Q. When the Golden State Pharmacy moved into its premises at 2450 San Bruno Avenue in San Francisco, were old fixtures moved into the store, or——

A. No, entirely new fixtures.

Q. Entirely new fixtures. Now have those same fixtures been there ever since?

A. Well, with a few modifications, yes.

Q. Did the fixtures that were moved into the store at that time include cigar showcases?

A. Yes, they did, and the same ones are still there.

(Testimony of Claude L. Davincenzi.)

Q. Same ones are still there. How many were there? A. Two. [139]

Q. Two. Did you as buyer at that time purchase the fixtures, including the cigar showcases?

A. That's right, it was all one contract.

Q. From whom did you buy them?

A. Regal Manufacturing.

Q. What is Regal Manufacturing, what sort of a business is it?

A. Well, they are general manufacturers of store fixtures.

Q. I see. And who, any particular individual at Regal that you know?

A. That's right, Mr. Cohen.

Q. Mr. Cohen? A. Henry Cohen.

Q. What is his position with Regal?

A. Well, at the time he was the owner of it.

Q. He was the owner of it. Do you know whether he is still the owner of Regal?

A. Well——

Q. Or connected with Regal?

A. Well I think he is kind of semi-retired. I think his son has taken over.

Q. Now in connection with these cigar showcases, Mr. Davincenzi, which you testified were installed as new fixtures at the *Golden Gate* Pharmacy prior to World War II, I am going to enumerate certain features, and I wish to ask you if those [140] showcases, those cigar showcases, have these features: First, were they what could be described as self-service cigar showcases?

(Testimony of Claude L. Davincenzi.)

A. Yes, sir.

Q. Now did these showcases, or do these showcases have steps to support cigar boxes?

A. They do.

Q. Do you have sliding glass panels covering the display area? A. They do.

Q. Do those sliding glass panels slope?

A. They do.

Q. Is there rear storage beneath the steps?

A. That's right, they do.

Q. Are there sliding doors closing that rear storage compartment? A. There is.

Q. Do the cigar showcases of the type you have described—are they in place in the Golden Gate Pharmacy at the present time?

A. That's right.

Q. And those very same cases without any modification were there prior to World War II, is that correct? A. They were.

Q. And have been there continuously ever since?

A. Absolutely. [141]

Q. I wish to hand you some photographs, Mr. Davincenzi, and ask you to identify them. First,——

(Conversation among counsel out of hearing of the reporter.)

Mr. Gregg: I have a group of four photographs which I would like to have marked in evidence as Defendants' Exhibit next in order.

The Court: You want the photographs as a

(Testimony of Claude L. Davincenzi.)

group in one exhibit, or do you want them separately identified?

Mr. Gregg: I think possibly it might be better if we have them separately identified, each photograph. There are four of them.

The Court: All right, then, it will be D—is that the next number in order?

The Clerk: Yes, your Honor.

The Court: All right, start with Defendants' D, then E, F and G.

(Whereupon photographs referred to above were received in evidence and marked Defendants' Exhibits D, E, F, and G.)

[See Book of Exhibits.]

Q. (By Mr. Gregg): I hand you, Mr. Davincenzi, certain photographs which are marked for identification Defendants' Exhibits D, E, F, and G, and ask you if you can identify them?

A. Yes, they are my showcases. I identify them.

The Court: What was that? [142]

The Witness: Identify them; they are my showcases.

The Court: All right, thank you.

Q. (By Mr. Gregg): Are the photographs of the showcases located at the Golden State Pharmacy in San Francisco, as to which you just testified?

A. They are.

Q. Did you see photographs being taken of the cases? A. Yes, I did.

Q. And was a set of photographs delivered to you? A. They were.

(Testimony of Claude L. Davincenzi.)

Q. Was the set delivered to you delivered by the man you saw taking the pictures?

A. They were.

Q. And the set that was delivered to you, I believe you told me you had misplaced it?

A. Yes.

Q. But can you say from recollection and memory that they appear to be identical with the photographs you have in front of you?

A. Absolutely.

Q. That is, Defendants' Exhibits D, E, F and G. Now I would like to ask you to examine these photographs very briefly and tell me whether any of them show any of the following features. Do they show steps, does any one of them show steps for supporting cigar boxes? [143]

A. They do.

The Court: Do the photographs need interpretation in that respect?

Mr. Gregg: Well, I am perfectly willing to pass on, your Honor, at that point.

The Court: In other words, you don't have to have this *witness to* the obvious. If those are photographs of his cigar cases or cigar showcases and they show the information, they don't need explanation. You don't have to explain them.

Mr. Gregg: I think that is very well taken, your Honor. They speak for themselves.

The Court: Yes.

Q. (By Mr. Gregg): Now, showcases of the type installed at the Golden State——

(Testimony of Claude L. Davincenzi.)

The Court: You desire to offer those in evidence?

Mr. Gregg: Yes, I would like to offer those in evidence.

The Court: Then they may be admitted in evidence in accordance with the numbers which they bear.

Now, then, would you hand them to the clerk and I will take a look at them? Let me look at them. All right, thank you.

Q. (By Mr. Gregg): Mr. Davincenzi, with respect to the two drugstores in the chain of the Central Drug Company, were cigar showcases of the type shown in the photographs, Defendants' Exhibits D, E, F and G,—were cigar showcases of [144] that type installed in either of the other two drugstores? A. They were.

Q. Were installations of that character made prior to about 1951? A. They were.

Q. Have you ever had occasion to replace any cigar showcases of this type in any of the three drugstores?

A. Well, I moved, changed my location four years ago, and I replaced the showcases in that one store, the cigar cases. I bought completely new fixtures.

Q. Did you make any replacement at an earlier date in any one of the three stores?

A. No, I did not.

Q. Did you, about 1946, install any showcases

(Testimony of Claude L. Davincenzi.)

or replace showcases at any one of the three drug-stores? A. Oh, in 1946?

Q. Yes.

A. Oh, yes, I enlarged the store and I installed that type showcase right over there (indicating).

Q. By "that" you are pointing to Defendants' Exhibit A let the record show.

Which of the stores did you install that at?

A. That was the Rex Drug.

Q. Is there anything to fix that date?

A. I think it was in 1944, if I remember right.

Q. 1944. At any rate, it was definitely long prior to 1951? A. Oh, yes.

Mr. Gregg: That is all. Your witness, Mr. Mellin.

The Court: Did he say—Is that the showcase that you installed?

The Witness: Similar type, except that I have a glass——

The Court: It is not the same showcase?

Mr. Gregg: No, I can stipulate to that. This didn't come from his store.

The Court: That's what I wanted to know. It is a similar one?

Mr. Mellin: We have no argument on that, your Honor, if it is the same.

Cross-Examination

Q. (By Mr. Mellin): Do you recognize Mr. Hursh sitting here, Mr. Davincenzi?

A. Mr. who?

(Testimony of Claude L. Davincenzi.)

Q. Hursh. A. I don't think I do.

Q. Did you ever meet him in your store at San Bruno Avenue?

A. I may have. I see so many faces, I can't remember them all.

Q. You don't recall someone coming in and asking you about the showcase, inasmuch as you were——

A. Oh, here about a week ago? Oh, yes, yes, sure I remember him. [146]

Q. Now, have you been entirely satisfied with the operation of those showcases, Mr. Davincenzi?

Mr. Gregg: Your Honor, I object to that.

Mr. Mellin: Just a moment.

The Court: Let him object.

Mr. Mellin: Yes, your Honor. I wanted to get my full question out.

The Court: Then get your question in and then you have the right to object.

Mr. Gregg: Sorry, your Honor. I thought he finished.

The Court: What is your question?

Q. (By Mr. Mellin): (Continuing) ——and didn't you express that to Mr. Hursh at that time?

Mr. Gregg: Your Honor, I object to that question as being clearly outside the scope of the direct examination and also as getting into the matter of the expertness of this witness with regard to the performance of cigar showcases. If Mr. Mellin wants to ask Mr. Davincenzi questions of

(Testimony of Claude L. Davincenzi.)

that character and treat him as his own witness, it is all right with the defendants.

The Court: What is the purpose of this, if it isn't just to make him an expert of yours?

Mr. Mellin: I am not making him an expert, I am asking him if as to him—he said he installed the showcases and used them. I am merely asking him if they were satisfactory in their use. [147]

The Court: What difference does it make if they are satisfactory?

Mr. Mellin: I think it makes a lot of difference, your Honor, if he says they are unsatisfactory. That is what he told my partner. There are these prior art devices put in to anticipate the invention.

The Court: That may be that they are going to claim they are prior art.

Mr. Mellin: Certainly, your Honor, and I want to show——

The Court: And I am sure Mr. Gregg concedes that that is the whole purpose of the testimony.

Mr. Gregg: Certainly. But assuming that to be true, what difference does it make if they are satisfactory or unsatisfactory?

Mr. Mellin: Well, if they are unsatisfactory, your Honor, and don't accomplish the result of the patented device, then they can't be prior art devices.

Mr. Gregg: Your Honor, it is Mr. Mellin's position that the cigar showcases of the Golden State Pharmacy are not satisfactory and are—if that is his purpose and if he means to show they are inferior to the Patriarca cases, he is perfectly at

(Testimony of Claude L. Davincenzi.)

liberty to show that through a witness of his own. But it is clearly without the scope of my direct examination.

The Court: Now, I am not sure about that. [148] If that is your position, I am not so sure. I realize that he has no right to make this witness into an expert.

Mr. Mellin: I am not trying to.

The Court: An expert on general questions of satisfactoryness. But as to whether or not these were satisfactory, in that they performed a function in the store satisfactorily, that's another question.

Mr. Mellin: That is all I am asking.

Mr. Gregg: Could we stipulate and agree that he is treating this witness as his own witness from now on?

Mr. Mellin: No.

The Court: No, I don't think he has to, because when you asked him if he installed these cases, you opened the subject of whether or not there is a generally satisfactory operation. I don't mean to say by that that this man becomes an expert witness on the cigar business and the kind of case that is the most satisfactory. I will narrow the cross-examination in that field. But I will overrule the objection, and I understand the proposition.

Now, do you understand the question, Mr. Davincenzi, or would you like to have it repeated?

The Witness: I would like it repeated.

Mr. Mellin: I will reframe it.

(Testimony of Claude L. Davincenzi.)

Q. (By Mr. Mellin): Have you found these cases entirely satisfactory for use in cigars in your store? [149]

A. Well, they were until recently.

Q. What do you mean, they were? What happened recently?

A. Well, I think I explained to the gentlemen that if you don't move your cigars very fast, that they dry out.

Q. In other words, that's always been the case with the cases, hasn't it?

A. Well, it wasn't during the war, when I used to sell cigars so fast.

Q. Oh?

A. Because cigars were hard to get and I was always fortunate enough to get an ample supply. I moved them very fast. Well, lately, naturally, everybody has cigars. I don't mean everybody, but you can buy them in a lot more locations than you could during the war, and I don't move them so fast. And when I don't move them so fast, sometimes I do get complaints that they are kind of dry.

Mr. Mellin: That's all.

The Court: Any further questions?

Mr. Gregg: No further questions.

The Court: That's all, Mr. Davincenzi, and thank you.

(Witness excused.)

Mr. Gregg: I would like to call as our next witness Mr. Henry Cohen.

HENRY COHEN

called on behalf of the defendants and sworn. [150]

Q. (By the Clerk): State your full name for the Court and record.

A. Henry Cohen, C-o-h-e-n.

Direct Examination

Q. (By Mr. Gregg): Where is your residence, Mr. Cohen? A. 601 Scott Street.

Q. What is your age, if you don't mind telling?

A. I am past 70.

Q. What is your business or profession?

A. Manufacturing store and office fixtures.

Q. What is your connection if any with the Regal Manufacturing Company?

A. I am past president of the Regal Manufacturing Company.

Q. Who is the president now?

A. Fred Cohen.

Q. Is he your son?

A. He is my son, yes, sir.

Q. Is the Regal Manufacturing Company located in San Francisco? A. Yes, sir.

Q. And its business is the showcase business, is that correct?

A. Yes, sir, for the last 48 years.

Q. As part of this showcase business, does it manufacture and sell cigar showcases?

A. Well, we make all types of showcases and store fixtures—all types of businesses.

(Testimony of Henry Cohen.)

Q. How long have you been engaged in that business? A. About 48 years.

Q. 48 years. Now I am going to describe certain features of a cigar showcase, Mr. Cohen, and I am going to ask whether Regal Manufacturing Company has ever manufactured cigar showcases having all of these features.

Mr. Mellin: If your Honor please, I don't mean to interrupt. I thought I might save time. If he is going into the same cases that the other witness said they manufactured, we have no contest as far as the other witness' dates are concerned or that he installed those that were in those photographs. I don't know if that is where counsel is going.

The Court: I imagine he wants a little broader field than that.

Mr. Gregg: I will cut short my examination in view of Mr. Mellin's stipulation, but I did want——

The Court: You will accept the stipulation, then?

Mr. Gregg: That's right, that he does not question the dates testified to by——

Mr. Mellin: That's right.

Mr. Gregg: ——by Mr. Davincenzi.

Mr. Mellin: That's correct.

The Court: Then you go into the other material.

Mr. Gregg: All right. [152]

Q. (By Mr. Gregg): Now I would like to hand you—if I may get those photographs, Defendants'

(Testimony of Henry Cohen.)

D, E, F and G,—I will hand you these and ask you if you recognize them as cigar showcases which you manufactured and sold to the Golden State Pharmacy. A. Yes.

Q. Mr. Cohen, has Regal Manufacturing Company ever sold self-service cigar showcases of the general type shown in Defendants' Exhibits D, E, F and G which are before you, in which the steps were formed with openings? A. Yes, sir.

Q. It did? A. Yes, sir.

Q. How long ago did Regal Manufacturing Company do that?

A. Well, before the certain type of material was available, we used to use expanded metal for ventilation or notching of grooves in the back risers, for ventilation.

Q. How long ago did you follow that practice, commence following that practice or doing that sort of thing?

A. Well, I believe that I was the originator of that slant front design of display, self-service display cigar case, sometime in, I would say, around 1930.

Q. And about 1930 or thereabouts?

A. That's right.

Q. Did you follow the practice on one or more occasions of [153] putting holes or perforations in the steps? A. Yes, sir.

The Court: You said in the steps. You meant in the risers?

The Witness: In the risers, that's right.

(Testimony of Henry Cohen.)

The Court: And they were perforations or holes, for, you called it, ventilation?

The Witness: That's right. I can show you a sample of the step that we have been using here since it has been available (displaying small square of masonite with holes evenly drilled).

Mr. Gregg: I would like to have this marked for identification as Defendants' Exhibit next in order.

The Court: Well, Defendants' Exhibit H for identification.

(Whereupon masonite referred to above was marked Defendants' Exhibit H for identification.)

The Court: However, I am not concerned at the moment with the new material, although I don't mean to foreclose that. I am more interested in when you first——

The Witness: Did before that?

The Court: Yes, and when you first developed this process of ventilated risers.

The Witness: Well, we did that well, practically from the time we made those cases, because——

The Court: You mean in 1930? [154]

The Witness: Well, from then on, yes.

The Court: From 1930?

The Witness: Yes. Sometimes we put, we'd get a pan, you know, and put some water in there and put a roll of toilet paper in there and use that for moisture, for ventilation.

(Testimony of Henry Cohen.)

Q. (By Mr. Gregg): Would that simple type of humidifier be placed below the steps?

A. Yes.

Q. And would it be the purpose or function of the holes or perforations in the risers to permit the circulation of humidified air?

A. That's true.

Q. From the storage space beneath the steps to the display portion above the steps? A. Yes.

The Court: What do you mean by humidified air?

The Witness: Moist air.

The Court: You just simply mean air that has been——

The Witness: ——moistened, yes.

The Court: Moisture has been added?

The Witness: That's right. You sometimes put in two of them, one on each end of the case there.

Q. (By Mr. Gregg): I hand you Defendants' Exhibit H for identification and ask you what that is. A. This here, you mean? [155]

Q. Yes, H, the object you have in your hand.

A. That's peg board, masonite peg board.

Q. When, to the best of your recollection, did you start using peg board?

A. Well, I believe it was in either 1950 or 1951.

Q. What led you to use that for the risers?

A. Well, it wasn't available before that there, and before that there, we were using expanded metal or, as I said before, grooves in the risers.

Q. Is it a fact, Mr. Cohen, that a person in the

(Testimony of Henry Cohen.)

manufacturing business such as yourself avails himself of new materials when they become available and if they are priced right? A. That's right.

Q. And with regard to the use of peg board, let us say, would that be an instance and example that became available that was suitable for the use, and you commenced using it when it became available? A. That's true.

Mr. Gregg: Those are all the questions I have, your Honor.

The Court: You may cross-examine.

Cross-Examination

Q. (By Mr. Mellin): Mr. Cohen, were these cigar cases——

The Court: Pardon me. Just one thing. Are you going to offer this in evidence? [156]

Mr. Gregg: Yes. Pardon me, your Honor, I would like to offer the last exhibit, Exhibit H, in evidence.

The Court: Defendants' Exhibit H will be admitted in evidence.

(Whereupon Defendants' Exhibit H for identification was received in evidence.)

The Court: All right, now proceed.

Mr. Mellin: Sorry, your Honor.

Q. (By Mr. Mellin): Were these cigar cases or other cases that you used this expanded metal in, Mr. Cohen?

(Testimony of Henry Cohen.)

A. Cigar cases and sometimes in bar candy cases. We used to put them on the bottom there.

Q. The bar candy cases?

A. Bar candy cases for display, self-serve bar candy cases, because there is always a certain amount of, you know, crumbs and one thing and another there that would always settle on the bottom there, and this way they would fall right through.

Q. Why didn't you use that material in the cigar cases in the Golden State Drug Store that you have testified to? A. What's that?

Q. I will show you photographs.

A. It wasn't available at that time.

Q. Well, you said expanded metal was available.

A. Yes.

Q. Why didn't you use it in those cases if it had that function? [157]

A. Well, there were grooves in there. I believe there were some grooves in there.

Q. You show me the grooves, will you, Mr. Cohen? I can't find them.

A. I can't see them in here without my glasses.

The Court: You are now talking about the risers?

The Witness: That's right.

Mr. Mellin: Steps and risers, yes, your Honor.

(Testimony of Henry Cohen.)

A. Well, from here you can't see. You can't see where the grooves are at all.

Mr. Mellin: I will show you the steps. The steps and the risers. You show me the grooves.

A. I don't see any in this one here.

Mr. Mellin: That's all.

Mr. Gregg: I would just like to ask a question of the witness, one question on redirect.

Redirect Examination

Q. (By Mr. Gregg): Mr. Cohen, if you wish to accomplish the function of humidifying cigars in a cigar showcase of the type before us in Defendants' Exhibit A, the one over here by the side of the courtroom, and if you wanted to place your humidifier out of sight and out of way down beneath the partition, wouldn't it be a perfectly obvious thing to make holes in either the steps or the risers to permit the air to circulate? [158]

A. That's true.

Mr. Mellin: Your Honor,——

The Court: Just a moment.

Mr. Mellin: If your Honor please, that is an ultimate fact for the Court as to what is obvious and what is invention.

The Court: What is the purpose of this testimony? I think Mr. Mellin's assertion is correct. Do you think you need testimony to prove that?

Mr. Gregg: Well, Mr. Mellin will concede it is an obvious thing, will he?

(Testimony of Henry Cohen.)

Mr. Mellin: That is ridiculous. Of course I won't concede anything. But, your Honor, that is one of the ancillary questions that your Honor has to decide for yourself. You don't need a witness to——

The Court: Well, as to whether or not the use of this process was or was not invention is a question for me to decide.

Mr. Mellin: That's correct.

Mr. Gregg: Whether or not it is obvious is a question of fact.

The Court: If you think it is a question of fact, I will overrule the objection and permit the witness to answer the question.

Mr. Gregg: All right.

The Court: I take it your answer is "yes"?

The Witness: May I have the question again?

The Court: Would you read it, please, Mr. Reporter?

(Record read.)

The Court: Then that answer stands.

Mr. Gregg: That's all.

The Court: Any further questions?

Mr. Mellin: No questions, your Honor.

The Court: That's all, and thank you, Mr. Cohen. You are excused.

(Witness excused.)

Mr. Gregg: We would like to call as our next witness Mr. Harold Stelling.

HAROLD STELLING

called on behalf of the defendants, sworn.

Mr. Gregg: For your information, your Honor, I would like to say the testimony of this witness will be with regard to Defendants' Exhibit A.

The Court: Would you please be seated, sir, and give us your name?

The Witness: Harold Stelling, S-t-e-l-l-i-n-g.

Direct Examination

Q. (By Mr. Gregg): Mr. Stelling, where do you reside?

A. 52 West Clay in San Francisco.

Q. What is your age, if you don't mind stating it?

A. I didn't get the question, sir. [160]

Q. What is your age, if you don't mind stating it? A. 57.

Q. What is your business or profession?

A. I am general manager and partner in the Royal Showcase Company.

Q. Where is the Royal Showcase Company located? A. 770 McAllister Street.

Q. How long have you been associated with the Royal Showcase Company?

A. Well, since 1941.

Q. Is Royal Showcase a partnership or a corporation? A. It is a general partnership.

Q. Are you one of the partners?

A. I am.

Q. Are you the manager of the business?

(Testimony of Harold Stelling.)

A. That is true.

Q. And you have been with Royal Showcase, you say, since 1940? A. Correct.

Q. What is the business of Royal Showcase Company?

A. The general manufacture and contracting of store fixtures.

Q. Among the store fixtures that Royal Showcase manufactures, does it manufacture cigar showcases? A. That's correct.

Q. And does it manufacture cigar showcases of the type that [161] can be described as self-service?

A. It does.

Q. Having steps to support the cigar boxes?

A. That's correct.

Q. Sliding glass panels covering the display portion? A. Yes.

Q. These glass panels slope? A. Yes.

Q. And there is a rear storage beneath the steps? A. Yes.

Q. And sliding doors to close that storage space, is that correct? A. Yes.

Q. How long has Royal Showcase Company been engaged in the manufacture of cigar showcases of that description, to your knowledge?

A. To my knowledge, I would say 12 or 15 years or more.

Q. Or more. Do you recognize the showcase over at the side of the courtroom which is marked for identification as Defendants' Exhibit A?

(Testimony of Harold Stelling.)

A. I believe so. I would like to take a close look at it if you don't mind.

The Court: Step down and take a look at it.

(Whereupon witness left the witness stand, examined Exhibit A and then resumed the witness stand.) [162]

Q. (By Mr. Gregg): The question is, Mr. Stelling, do you recognize Defendants' Exhibit A?

A. Yes, that is a case which we manufactured.

Q. Do you recall whether you sold, whether Royal Showcase sold such a case to the Palm Liquor in San Francisco? A. That's the case.

Q. Do you have any document or documents with you which relates to the sale of that showcase?

A. Yes, sir, I have the original, or the carbon copy, rather, of the original bill covering the sale of the case.

Mr. Gregg: I would like to have this document marked for identification as Defendants' next in order.

Mr. Mellin: No objection.

The Court: That will be Defense Exhibit I, will it not?

The Clerk: Yes, your Honor.

(Whereupon carbon copy of invoice referred to above was marked Defense Exhibit I for identification.)

Q. (By Mr. Gregg): Do you have any other document?

A. I have a delivery receipt for the delivery of the case.

(Testimony of Harold Stelling.)

Mr. Gregg: I would like to have that document marked for identification as Defendants' Exhibit next in order.

The Court: It will be Defendants' Exhibit J for identification.

(Whereupon delivery receipt referred to above was marked Defendants' Exhibit J for identification.) [163]

Q. (By Mr. Gregg): I hand you, Mr. Stelling, Defendants' Exhibits I and J and ask you to describe them.

A. Exhibit I is the carbon copy of the original bill sent to the customer, Tom Parrino, Palm Liquors, at Pierce and Haight Streets.

Q. What is the date on that?

A. June 30, 1950.

Q. Is that the date on which the cigar showcase was sold to Palm Liquors?

A. That's correct. Probably was sold, actually sold maybe a week or two or three weeks before that time. The case had to be made.

Q. What is the other document?

Mr. Mellin: What was that date?

The Court: June 30, 1950.

Mr. Mellin: June 30, 1950.

Q. (By Mr. Gregg): What is the other document, which I believe is Defendants' Exhibit J?

A. That is the receipt for the delivery of the case to the customer, Palm Liquors.

Mr. Mellin: What's that date?

The Witness: June 15, 1950.

(Testimony of Harold Stelling.)

Q. (By Mr. Gregg): The two documents, Exhibits I and J; are they documents kept, are they documents of the type kept in the regular course of your business at Royal Showcase? [164]

A. That's correct.

Mr. Gregg: I would like to offer in evidence Defendants' Exhibits I and J.

The Court: They will be admitted into evidence in accordance with the numbers they have been marked for identification.

(Whereupon Defendants' Exhibits I and J for identification were received in evidence.)

[See Book of Exhibits.]

Mr. Gregg: I would like to hand the witness some photographs, and first have them marked for identification.

The Court: The first one will be Defendants' Exhibit K. How many photographs are there?

Mr. Gregg: Three photographs.

The Court: They will be Defendants' K, L and M.

(Whereupon three photographs referred to above were marked Defendants' Exhibits K, L and M for identification.)

Q. (By Mr. Gregg): I hand you, Mr. Stelling, Defendants' Exhibits K, L and M and ask you if you can identify them as photographs of a cigar showcase.

Mr. Mellin: May I ask you, Mr. Gregg, are these pictures of that cabinet over there, or ones just like it?

(Testimony of Harold Stelling.)

Mr. Gregg: These are pictures of that very cabinet, Mr. Mellin. Would you so stipulate?

Mr. Mellin: Sure.

Mr. Gregg: Fine. Well then, that's all that I have of this witness. [165]

The Court: What about Exhibit A?

Mr. Gregg: Oh, yes; I would like to offer Exhibit A in evidence, your Honor. I am sorry.

The Court: It will be admitted into evidence as Defense Exhibit A.

(Whereupon Defendants' Exhibit A for identification was received in evidence.)

The Court: You may cross-examine.

Mr. Mellin: Thank you, your Honor.

Cross-Examination

Q. (By Mr. Mellin): Mr. Stelling, do you recall about three years ago——

The Court: Just a moment, pardon me.

Mr. Gregg: It has just been called to my attention I also forgot to offer in evidence Defendants' Exhibits K, L and M. I would like to do that.

The Court: Yes, they should be admitted into evidence in accordance with the stipulation, and they will be. They will be admitted into evidence under the letters they have been marked for identification.

(Whereupon Defendants' Exhibits K, L and M for identification were received in evidence.)

[See Book of Exhibits.]

Q. (By Mr. Mellin): You recall about three

(Testimony of Harold Stelling.)

years ago, Mr. Stelling, your concern made a cabinet that was substantially a duplicate of the ones that you see here in front of you? [166] I don't mean in detailed construction, but of that——

A. It was of that nature, yes, sir.

Q. Those dimensions and that design?

A. Yes.

Q. And you will recall the situation under which you made it was that one of the Sosnicks took one of your men or you out to a store and asked you to duplicate that cabinet. Do you recall that, do you not?

A. I didn't personally handle it.

Q. But someone did?

A. I know of the transaction.

Q. And that's what occurred?

A. And a case similar in design, I presume, was made at that time.

Q. Do you remember which Sosnick it was?

A. Well, I wouldn't know. May have been Marvin, one of the boys.

Q. And at that time the product that you came up with for them was a substantial duplicate, and right after that time, isn't it a fact that your attention was called to these Patriarca patents?

A. Yes, that's correct.

Q. And that you advised the Patriarca people that you didn't know of the existence of the patent and you would cease making the cabinet of that type? [167]

A. No, I don't think I agreed to cease making a cabinet of that type. I may have told them that

(Testimony of Harold Stelling.)

we were in the business of making custom store fixtures and made cases of that type, usually only upon the request of a customer, and that I did not, I would not as a matter of policy, infringe upon the patent rights of a competitor.

Q. And you subsequently didn't make any more cabinets just like these here, that you duplicated for Mr. Sosnick?

A. That I don't know. I can't say.

Q. You can't recall? A. No.

Q. How many of these cabinets just like Exhibit A have you made?

A. That would be hard to say, but we have made cabinets for that, of that nature, for many years, for display, with a glass front.

Q. I am talking about this particular design, for cigars, just the way it is.

A. That is an old design, sir. It is used in back-case construction as well as front-case construction where the sliding glass is in the front, just as it is on that, and more or less self-service.

Q. For almost all materials?

A. All kinds of merchandise.

Q. Hardware? [168]

A. I don't do business with hardware people, but drugstores and merchandising stores.

Q. In other words, it is a cabinet of general purpose? A. That's right.

Mr. Mellin: That's all.

(Testimony of Harold Stelling.)

Redirect Examination

Q. (By Mr. Gregg): Mr. Stelling, with regard to the alleged transaction with the Sosnicks some-time ago, it is your testimony, is it not, that——

Mr. Mellin: Just a moment. I don't think you ought to lead the witness as to what his testimony is.

Mr. Gregg: All right.

Q. (By Mr. Gregg): Were you a witness to the transaction yourself?

A. I knew of the transaction in that we were making a case for Sosnick of that nature.

Q. Now, by "of that nature," what do you mean?

A. Well, display front like this one, steps to hold cigars.

Q. Did you know whether it was showcase manufactured by Patriarca?

A. Not at that time, no.

Q. You did not. You learned of that later?

A. That's right.

Q. As a matter of fact, you don't know, do you, whether the cigar cabinet which you were asked to copy was a Patriarca cabinet? A. No.

Mr. Gregg: That's all.

Mr. Mellin: No further questions.

The Court: That's all, sir. This witness can be excused?

Mr. Gregg: Yes, your Honor.

The Court: You will be excused, then, Mr. Stelling.

(Witness excused.)

Mr. Gregg: Call as our next witness Mr. Melvin Sosnick.

Mr. Gregg: I would like to ask the Court and Clerk, since I am rather forgetful about offering exhibits in evidence, if all up to the present defendants' exhibits have been offered and received in evidence.

The Court: They have.

MELVIN SOSNICK

called as a witness on behalf of the defendants, sworn.

Q. (By the Clerk): State your full name for the Court and record.

A. Melvin Sosnick.

Direct Examination

Q. (By Mr. Gregg): What is your age, Mr. Sosnick? A. 60.

Q. Where do you reside?

A. At 30 Encanta.

Q. What is your business or profession? [170]

A. I am a wholesale distributor, partner in the Melvin Sosnick Company.

Q. What is the nature of the wholesale business?

A. Well, we distribute and job cigars, cigarettes, tobaccos, candies, sundries and so forth.

(Testimony of Melvin Sosnick.)

Q. The wholesale business goes under the name of Melvin Sosnick Company, is that correct?

A. That's right

Q. Is this a partnership? A. It is.

Q. Are you one of the partners? A. I am.

Q. Who are the other partners?

A. My three sons.

Q. When was the Melvin Sosnick Company founded? A. In 1932.

Q. Were you the founder? A. I was.

Q. Has the Melvin Sosnick Company ever been sued before, Mr. Sosnick?

A. This is the first time I have ever appeared in a courtroom, not only that I wasn't sued. [171]

* * * * *

Q. Mr. Sosnick, does the Melvin Sosnick Company manufacture showcases? [173]

A. No, they don't.

Q. Who manufactures the cigar showcases which the Melvin Sosnick Company sells?

A. Rubinfeld Showcase Company.

Q. Do you know whether or not the Rubinfeld Showcase Company manufactures showcases for other people than Melvin Sosnick Company?

A. This was, we started buying the showcases from Rubinfeld Showcase Company when we sell a showcase or two showcases in a retail store, where they purchase it right from Rubinfeld, and to date Rubinfeld sells other people here in San Francisco and elsewhere.

Q. Does the Melvin Sosnick Company, or has

(Testimony of Melvin Sosnick.)

the Melvin Sosnick Company ever had anything to do with the design of the showcases which it has purchased from Rubinfeld Showcase Company?

A. Nothing whatsoever.

Q. Are you exclusive distributors in San Francisco or in any other area for Rubinfeld Showcase Company? A. No, sir.

Q. And as far as you know, anyone in San Francisco or any place else can obtain showcases from Rubinfeld Showcase Company on the same terms that you do? A. That's right.

Q. Mr. Sosnick, have you at any time asked Mr. Stelling or [174] anyone connected with the Royal Showcase Company or anybody else to copy a Patriarca showcase? A. No, sir.

Q. Do you know whether anyone in the Melvin Sosnick Company has made such a request?

A. As far as I know, no.

Q. Have you asked the Rubinfeld Showcase Company to give assistance in this lawsuit?

A. I did.

Q. Did they refuse to give you assistance?

A. Mr. Rubinfeld told me that he has been in business seven or eight years, that he was in a concentration camp for six years, and that was—he was financially unable to assist me in the expense of this case here.

Q. Then is the financial burden of defending this lawsuit, is that being borne entirely by the Melvin Sosnick Company? A. Entirely.

* * * * *

(Testimony of Melvin Sosnick.)

Q. (By Mr. Gregg): Do you regard it as unjust and unfair that the Melvin Sosnick Company should be sued for infringement, alleged infringement of the Patriarca and Cameron patents? [175]

* * * * *

A. I believe that I am persecuted, singled out, because we only sell probably one-tenth of one per cent of the cases sold by Rubinfeld. I think, and can't understand why two men would travel three thousand miles to come to San Francisco to sue one individual distributor who is in only one city and vicinity, when he can do it right in his backyard. Now, why it is done that way, I don't know.

Mr. Gregg: That's all.

Mr. Mellin: No questions, your Honor.

The Court: That is all, sir. You may step down.

(Witness excused.)

Mr. Gregg: I would like to call as our next witness Mr. Marvin Sosnick.

MARVIN SOSNICK

called on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gregg): State your name, Mr. Sosnick.

A. My name is Marvin Sosnick, S-o-s-n-i-c-k.

Q. Are you one of the defendants in this suit?

A. I am.

(Testimony of Marvin Sosnick.)

Q. Are you the son of Melvin Sosnick, the witness who just finished testifying? [176]

A. That's right.

Q. Are you one of the partners in Melvin Sosnick Company? A. I am.

Q. What is your particular connection with the Melvin Sosnick Company?

A. More or less in charge of sales and promotions.

Q. How long have you held that position?

A. Oh, about ten years.

Q. What were you doing prior to that?

A. Well, just learning that business.

Q. The business of Melvin Sosnick Company is that of a wholesaler of cigars, candy and cigarettes, is it not? A. That's correct.

Q. In what territory does the Melvin Sosnick Company operate?

A. In the San Francisco area, down the Peninsula, Santa Rosa.

Q. It is not a state-wide business, is that true?

A. It is not.

Q. Is it considerably smaller than, let us say, Glaser Brothers as a cigar wholesaler?

A. That's right.

Q. Is the cigar business an important part of the business of Melvin Sosnick Company?

A. It is.

Q. Could you tell us, beginning at the beginning as far as [177] you know it, how the Melvin Sos-

(Testimony of Marvin Sosnick.)

nick Company got into the business of selling cigar showcases?

A. Well, we had requests from our retailers for such type case or a self-service case, I should say. I was visiting with one of our retailers and he told me that he had purchased two of these cases from Rubinfeld. Presently the cases were delivered while I was still in the store. I liked the case and offered it to our retailers.

Q. Did you at any time request Mr. Stelling or anyone else connected with the Royal Showcase Company or anybody to copy a Patriarca case?

A. No, sir.

Q. Do you know whether anybody else connected with Melvin Sosnick Company made any such request?

A. I would be the only one who would make such a request.

Q. And you did not? A. I did not.

Q. At any time did you ask the Rubinfeld Showcase Company to design a particular case for you?

A. Never.

Q. There was a change that was made in the case which you are selling, and that is best shown in Defendants', or rather, Plaintiff's Exhibit 3, where a witness yesterday drew in in pencil a modification change in the cabinet. Did you request Rubinfeld Showcase Company to make that change? [178]

A. No, I didn't. In fact, I was rather surprised when I saw a shipment come in that way.

Q. At the time the Melvin Sosnick Company

(Testimony of Marvin Sosnick.)

commenced to engage in the sale of self-service cigar showcases, did you know anything about the patents to Mr. Cameron and Mr. Patriarca, which are in suit in this case? A. No, I didn't.

Q. Do you know whether anybody else connected with Melvin Sosnick Company knew of these patents at that time? A. No, they didn't.

Q. Rubinfeld Showcase does not manufacture exclusively for Melvin Sosnick Company, is that correct? A. That's right.

Q. Do you have any idea about the percentage of the output of Rubinfeld Showcase Company that you sell?

A. Well, I saw Mr. Rubinfeld last October and at that time I believe he said he put out over a thousand cases.

Q. And is your proportion small or large in comparison to that amount of showcases?

A. It is a fraction of a per cent of that.

Q. As far as you know, anyone anywhere can purchase Rubinfeld showcases from Rubinfeld Showcase Company? A. That's right.

Q. Without going through you?

A. Yes. [179]

Mr. Gregg: That's all.

The Court: Cross examination.

Cross Examination

Q. (By Mr. Mellin): Mr. Sosnick, how long have you known Mr. Stelling?

A. Oh, I guess I have known him for, well,

(Testimony of Marvin Sosnick.)

maybe ten to twelve years.

Q. He is rather a reputable citizen, isn't he?

A. He is.

Q. And you didn't believe him on the stand this morning, did you? A. I beg your pardon?

Q. In his testimony, you didn't believe his testimony this morning, did you?

A. I believed his testimony, of course you must realize, Mr. Stelling did not say that I was the one, nor that it was anyone particularly from our organization who asked him to copy a showcase. It may have been one of our customers. [180]

* * * * *

Q. (By Mr. Mellin): Now, before this suit was brought against the Sosnick Company, you had had written notices of the patents in suit, did you not?

A. That's correct.

Q. And before the suit was started, you had ample opportunity of discontinuing what you were charged with, did you not—had you not?

A. The reason we didn't discontinue putting out the cases is, we went to some of our people that we knew in the manufacturing business and they told us they had been making these cases for many, many years, same type cases. We took it up with our attorneys and they told us to keep going ahead and selling cases.

Q. I mean, you weren't sued without an opportunity of stopping the acts that were complained of?

A. Well, that I don't know. I don't know what

(Testimony of Marvin Sosnick.)

was in the back of Mr. Patriarca's mind when he set the thing up.

Q. Now, I don't think you understood my question, Mr. Sosnick. You were first given notice that you were infringing? A. That's right.

Q. And at that time, to avoid the lawsuit, you could have stopped distributing these? [181]

A. That's correct.

Q. This minute number of cases you say that you handled? A. That's right.

Q. But you didn't do that?

A. That's right.

Q. You preferred to stand suit?

A. I didn't say that.

Q. What did you say?

A. I said that we had taken the thing up with other showcase manufacturers. They had showed us where they had made similar type cases in the past many, many years. We took it up with our attorneys and on their advice we continued selling the cases.

Q. In spite of the warning?

A. That's right.

Q. So you expected to be sued?

A. Well, I don't expect anything. I can't say I expected to be sued, no.

Q. I see. Now at that time, at the time of the suit, was it a profitable business to the Sosnick Company to distribute these cases?

A. It was not.

Q. It was not. Is it now?

(Testimony of Marvin Sosnick.)

A. We make a reasonable profit, oh, probably four, five, maybe six per cent. [182]

Q. But at the time it wasn't profitable, but you still preferred to continue manufacturing?

A. Well, if you call four or five or six per cent profitable, then I would say it was profitable.

Q. You don't consider it so?

A. Beg pardon?

Q. You don't consider it so?

A. Not a very, very small margin, no—on the small amount we have sold.

Mr. Mellin: That's all, your Honor. [183]

* * * * *

DONALD LIPPINCOT

called on behalf of the defendants, sworn.

The Court: I want the record to show that I am personally acquainted with this witness. As a matter of fact, he was a classmate of mine in law school and I have known him for a long time well and honorably.

Q. (By the Clerk): State your full name.

A. Donald K. Lippincot.

Direct Examination

Q. (By Mr. Gregg): Where do you reside, Mr. Lippincot?

A. 56 Lacuesta Drive, Orinda, California.

Q. If you don't mind telling us, what is your age?

A. 67.

Q. What is your profession?

(Testimony of Donald Lippincot.)

A. I am a patent lawyer and registered professional engineer.

Q. Do you practice in your profession here in San Francisco? A. I do.

Q. Would you, commencing after you left high school, outline briefly your education?

A. I was graduated from the University of California in the College of Mechanics in 1913. I practiced as an engineer for [184] 14 years, then took up the study of patent law. I was registered as what was then known as a registered patent attorney, and would now be called patent agent. Sometime later I went to law school, as his Honor has indicated. I did not graduate—I was later admitted to the California Bar.

Q. Could you describe very briefly your career since leaving college? You testified, I think, you graduated in engineering from the University of California.

A. I spent about 25 years immediately after graduation in various phases of the manufacture of x-ray apparatus. I then took a job as a development engineer in the development and manufacture of thermo-relays for the protection of electric motors.

Q. Have you had any practical experience in industry, Mr. Lippincot? And by that I mean other than in connection with your profession as a patent attorney and patent lawyer.

A. Yes, I became chief engineer of this outfit manufacturing thermo-relays, which was responsible for a number of patents there which were later

(Testimony of Donald Lippincot.)

purchased by the General Electric Company. I spent two years then as engineering partner of a promoter of patented inventions, and then at the advent of broadcasting, I was first the sole engineer of a small manufacturer of radio equipment. I went later to the Magnavox Company and was first radio engineer, and then chief engineer for the Magnavox Company, prior to going into patent work when [185] the Magnavox Company moved East.

Q. In connection with your practical experience in industry, have you ever had occasion to handle problems concerning the design of cabinets?

A. It was minor feature of the work in x-ray and in radio work. As chief engineer, the man in charge, I had to know something about cabinets.

Q. Were you in the military service during World War II? A. I was.

Q. Would you describe your rank and your duties and office in that connection?

A. I was called to duty with the rank of major in January, 1941. I was first assigned to the research and development division of the office of the Chief Signal Officer in Washington, D. C. In that capacity and later, I was signal corp liaison officer with what was first known as NBRC and later absorbed by OSRD, office of scientific research and development. I was liaison officer with the National Inventors Council. In November of 1941, a legal division was set up in the office of the Chief Signal Officer. At that time I was transferred to the legal division as patent and inventions counsel. In that

(Testimony of Donald Lippincot.)

capacity I was in charge of all patent work of the signal corp. But as inventions counsel, I had the duty of doing the first screening of all inventions that were submitted to the signal corp. I was promoted to first a lieutenant colonel and then [186] to colonel. I got my colonelcy in July of '45, and shortly thereafter I was made director of the legal division, the office of Chief Signal Officer.

Q. In connection with the duties with the signal corp, did you have wide experience in handling and evaluating inventions?

A. I did. I had been termed "the bottleneck" for inventions coming into the signal corp. The first screening was done by the National Inventors Council in general. Following that, the inventions that were deemed worthwhile came to my desk. I and my staff evaluated them, and then in consultation with the various engineering divisions, examined the military needs and practicality, and the possibility of putting them into actual manufacture. In addition to that job, the signal corp took a large number of licenses. We negotiated some, not for the signal corp alone but for the government. We negotiated licenses under what was generally estimated as about 20,000 patents. Many of those were offered freely. In other cases the owners of the patents desired royalties or license fees, and in some cases those license fees were very large, and under those circumstances we had to evaluate the inventions covered by the patents, and it sometimes involved very careful evaluation.

(Testimony of Donald Lippincot.)

Q. Mr. Lippincot, have you visited the Palm Liquor Store which is located, I believe, at Haight and Pierce Streets in San Francisco? [187]

A. I did.

Q. And did you see a self-service cigar showcase at that location? A. I did.

Q. Do you recognize the showcase inside the courtroom which is in evidence as Defendants' Exhibit A, as the same case? A. I do.

Q. Have you also visited the Golden State Pharmacy at 2450 San Bruno Avenue in San Francisco?

A. I did.

Q. Did you observe any showcases at that location? A. I did.

Q. I would like to ask you if you will recognize—I hand you Defendants' Exhibit D, E and F and ask you if you recognize those as photographs of the showcase at Golden State Pharmacy at 2450 San Bruno Avenue?

A. They appear to be the same both as to the structure and environment.

Q. Now directing your attention, Mr. Lippincot, to Plaintiff's Exhibit 3, which is an enlargement of a drawing of the Cameron design Patent 168,288, I would like to ask you whether that resembles the showcases at the side of the courtroom, which is Defendants' Exhibit A?

A. It has many features in common.

Q. Do the two generally resemble each other?

A. I think we could say so.

Q. What if any is the principal difference in the

(Testimony of Donald Lippincot.)

appearance between the Cameron showcase as shown in Plaintiff's Exhibit 3 and the showcase at that side of the courtroom, which is Defendants' Exhibit A?

A. The showcase, Exhibit 3, has a somewhat larger display window in comparison with the wooden base, the wooden riser, and the base slants rearwardly instead of rising vertically. The lower panel, that is.

Q. By "base," do you refer to the portion which is marked E on Defendants' Exhibit 3?

A. Yes, I refer to that lower panel marked E.

Q. Now with regard to the lower panel or the sloping lower front, as it has been sometimes called, do you know whether or not that is anything new or novel in connection with display cabinets?

A. It is shown in many cabinets in the prior art with different degrees of slope, different—all sorts of varying ratios of dimension between the glass display portion and the sloping lower panel, lower front.

Mr. Gregg: I would like to have marked for identification certain patents. Mr. Mellin, this is a photostatic copy of an Italian patent.

Mr. Mellin: Yes.

Mr. Gregg: Stipulated that the translation is a true and [189] accurate translation?

Mr. Mellin: No objection.

The Court: Do you so stipulate?

Mr. Mellin: Yes, your Honor.

(Testimony of Donald Lippincot.)

Mr. Gregg: I hand the clerk Italian Patent No. 459257 and ask that it be marked for identification.

The Court: Next in order.

The Clerk: N.

The Court: Defendants' Exhibit N. And that is Italian patent——?

Mr. Gregg: Italian Patent 459257.

(Whereupon Italian Patent No. 459257, referred to above, was marked Defendants' Exhibit N for identification.)

Mr. Gregg: I also hand the clerk a copy of the Tamsen Patent, U.S. Patent No. 2575643.

The Court: Defendants' Exhibit O for identification.

(Whereupon Tamsen Patent, U.S. Patent No. 2575643, referred to above, was marked Defendants' Exhibit O for identification.)

Mr. Gregg: Also hand the clerk a copy of Jensen Patent No. 1542242 and ask that that be marked next in order.

The Court: What's that number again?

Mr. Gregg: 1452242.

The Court: That's Defense Exhibit P for identification.

(Whereupon Jensen Patent No. 1452242, referred to above, was marked Defendants' Exhibit P for identification.) [190]

Mr. Gregg: I also hand the clerk a copy of Dulgeroff U.S. Patent No. 11612466 and ask that be marked as exhibit next in order.

The Court: Defense Exhibit Q for identification.

(Testimony of Donald Lippincot.)

(Whereupon Dulgeroff U.S. Patent No. 11612466, referred to above was marked Defendants' Exhibit Q for identification.)

Mr. Gregg: I also hand the clerk a copy of U.S. Patent to Leibe, No. 977318, and ask that be marked next in order.

The Court: Defense Exhibit R for identification.

(Whereupon U.S. Patent to Leibe, No. 977318, referred to above, was marked Defendants' Exhibit R for identification.)

Q. (By Mr. Gregg): I hand to you, Mr. Lippincot, Defendants' Exhibits N, O, P and R, and I ask you if you recognize them as copies of patents granted to more than year prior to the filing date of Cameron Patent 168288, and to refresh your recollection, the filing date is May 7, 1952. Hand you a copy for your convenience of the Cameron Design Patent.

A. Thank you. Yes, I have examined these previously. I recognize all of them as those that I have looked at and compared with these.

Mr. Gregg: I would also like to add to that group of patents one further one, Rosenberg, 543657, and have it marked as Defendants' Exhibit next in order.

The Court: That is Defendants' Exhibit S.

(Whereupon the patent referred to above, Rosenberg, [191] 543657, was marked Defendants' Exhibit S for identification.)

Q. (By Mr. Gregg): I hand you Defendants' Exhibit S and ask you the same question, whether

(Testimony of Donald Lippincot.)

you recognize that as a patent granted more than one year prior to the filing date in the Cameron Design Patent? A. I do.

Q. Do any of these patents show in connection with a display cabinet the feature of a sloping lower front wall, such as shown as E in Plaintiff's Exhibit 3?

A. They do, starting with the Rosenberg Patent, which issued July 30, 1895. That feature is shown and its utility is described, at the bottom of the first column beginning at line 96—or the second column, excuse me, of the first page.

Mr. Gregg: I have some copies of the patent if you would like them for reference, your Honor.

The Court: Yes, I would.

Mr. Gregg: This is the Tamsen patent, which I believe is the first one of the group, then the Jensen patent, the Dulgeroff patent, the Leibe patent. But I don't have a spare copy of the Rosenberg patent. Just the one the witness has.

The Court: All right.

Q. (By Mr. Gregg): Will you proceed?

A. At the beginning, beginning at line 96,—

Q. Which patent is this, now?

A. This is the Rosenberg patent, Exhibit S, I believe. Yes. [192] It says: "The front of the attachment inclines from the top—" incidentally, this is the attachment to a counter for, I take it, dry goods stores and the like. And it is to add a display to such a counter. It says:

"The front of the attachment inclines from the

(Testimony of Donald Lippincot.)

top outward to the molding (B super 4) and from the molding (B super 4) to the base of the attachment (B super 5) inclines inward. The purpose of this arrangement is to allow the purchaser to stand near the counter, the space below the molding (B super 4) permitting the feet to pass inward while the apex of the angle (B super 4) prevents the glass from being broken by the person in front of the counter coming in contact with it."

In this one—(indicating to the Court).

The Court: I have a copy of it now.

The Witness: All right, sir.

Mr. Gregg: Which one is that?

A. That is the Rosenberg patent.

Q. Which is—— A. Exhibit S.

Q. S.

A. In the Italian patent,——

Q. The exhibit number there is what, Mr. Lippincot? A. N.

Q. N. [193] A. Yes, I believe so.

The Court: I don't think I have the Italian patent.

Mr. Gregg: Oh, I believe I have another copy.

Mr. Mellin: May I offer the Court mine?

Mr. Gregg: I am sorry, I just don't have an extra copy of that.

(Conversation among counsel and Court out of hearing of the reporter.)

Mr. Gregg: There is no translation attached, but the drawings are attached to the patent.

The Court: All right.

(Testimony of Donald Lippincot.)

A. (Continuing) This is described, this Italian patent, Exhibit N, is described in the translation. It is a case for keeping and delivering retail food products such as pastes, rice, flour, vegetables, citrus and other fruits, and the like. It is especially adapted to retail shops. As is quite clear from the drawings, this has an outwardly sloping upper panel and an inwardly sloping lower panel. The upper panels can be opened, not in this case by sliding, but by tilting, to get at the foods that are shown inside. The slope is different from the Rosenberg patent, but the purpose is generally the same.

Exhibit O is the Tamsen patent.

Q. T-a-m-s-e-n?

A. T-a-m-s-e-n. It is a popcorn warmer. It shows the same [194] general arrangement. Again the slopes are slightly different.

The Jensen patent is another counter that has varying slopes front and back.

Dulgeroff, Exhibit Q, exhibits the same features. In this, the front with the varying slopes forms a tilting bin. But the profile, the end view of all these, are extremely similar, with but very slight variations in the slopes.

The Leibe, the Bonnaffons patent, Exhibit R, goes back to 1910. It shows a glass front to view the material inside. It slopes rearwardly, and the lower portion slopes forwardly. And these patents date, as I mentioned, this last one is 1910, Exhibit Q, Dulgeroff is 1915, Jensen, Exhibit P is 1923. Tamsen, the popcorn warmer, Exhibit O, is 1951. The

(Testimony of Donald Lippincot.)

Italian patent was granted September 1, 1950, and published in April of 1951. The Rosenberg patent, as I already mentioned, is 1895.

Q. Were any of the patents as to which you have just testified, and which are marked for identification as Defendants' Exhibits N, O, P, Q, R and S,—were any of those patents prior patents considered by the patent office in the prosecution of the application which led to the Cameron Design Patent?

A. They were not.

Q. Were not? A. Yes, were not. [195]

Mr. Gregg: I believe we can stipulate, Mr. Mellin, that the date of invention with regard to the Cameron patent is approximately September of 1951?

Mr. Mellin: I think that will be all right. Oh, no. September? No, I think that—yes, that's approximately right, yes.

Mr. Gregg: There is a stipulation, we can correct it if it is in error.

Mr. Mellin: I think that's correct. Without my glasses I didn't see that November date there.

Q. (By Mr. Gregg): In view of the state of the *arc* as shown by the patents as to which you have testified, Defendants' Exhibits N, O, P, Q, R and S, would there be anything unobvious in providing a self-service cigar showcase having the general features shown in Defendants' Exhibit A and modifying that so as to incline the lower front wall?

A. Not in my opinion. It appears quite obvious

(Testimony of Donald Lippincot.)

to me from viewing these patents that a showcase is built very largely, a great many of them, as was testified here this morning,—they are built to order to meet a particular requirement to fill a specific space. We have shown here all sorts of different slopes. We have the rearwardly inclined front panel repeated many times. And I think that the Rosenberg patent sets forth as clearly as any of these do the reason for doing that. [196]

Q. And that reason again is what?

A. Beg pardon?

Q. The reason is what?

A. The reason is to allow the purchaser to stand near the counter, permitting the feet to pass inward while the apex of the angle prevents the glass from being broken by the person in front of the counter coming in contact with it. I have omitted the reference characters in rereading that.

Q. Would it be correct to say that the sloping lower front wall of a cigar showcase, such as shown in the Cameron Design Patent, is primarily a utilitarian feature rather than an ornamental feature?

A. I would think so, yes.

Q. You have testified that you have visited the Golden State Pharmacy at 2450 San Bruno Avenue, San Francisco, and also Palm Liquor, out at Haight and Pierce in San Francisco, and have seen the showcases there. At the time you saw them, were they filled with merchandise? A. They were.

Q. What was the merchandise?

A. Cigars.

(Testimony of Donald Lippincot.)

Q. In boxes? A. In boxes.

Q. Did the cigar boxes completely cover the steps and risers so that you could not easily detect them? [197] A. They did.

Q. Bearing in mind the fact—Is it your observation that that is the normal appearance of a cigar showcase to a customer, that is, that it is filled with cigar boxes so that you cannot see the steps and risers?

A. Well, as can be seen by a glance at the cigar case, Exhibit A, if the cigars are displayed in boxes so that the cigars themselves can be seen, the boxes will be open and the covers of the boxes will conceal the risers, while the box itself conceals the steps.

Q. Looking now at the three cigar showcases which are in the courtroom, the one on the right, Plaintiff's Exhibit 5, the Patriarca case, the one on the left, Plaintiff's Exhibit No. 10, which is sold by the Melvin Sosnick Company, and the one over next to the wall of the courtroom, which is Defendants' Exhibit A, and assuming that they are filled with boxes of cigars, is there a strong resemblance among all three? A. There is.

Q. I direct your attention to the feature of Defendants' Exhibit A, the Palm Liquor cigar cabinet, and to the black portion which I believe is called a "kickstand" by some people, at the bottom of it. In normal use, that kickstand elevates the lower edge of the case about, I would say,—would you say four or five inches off the floor? A. Yes. [198]

Q. What is the purpose of that?

(Testimony of Donald Lippincot.)

A. Same as that of the sloping, rearwardly sloping lower front.

Q. And that function is what?

A. To let the customer get his feet underneath without stubbing his toe.

Q. Now with regard to a modification of the cabinet sold by Melvin Sosnick Company as illustrated, I would rather in this connection show you a stipulation which stipulates as to the appearance of the cabinets and——

Mr. Gregg: Mr. Mellin, I would like to ask either that we consider the original stipulation on file in the case as a part of the record, or——

Mr. Mellin: That's all right.

Q. (By Mr. Gregg): I hand you my copy of a stipulation of file in the case, stipulating concerning the devices manufactured, sold and used by the defendants, and I direct your attention to the second sheet of drawings attached, as to figure two, and ask you what would be the function of the overhang?

A. The same as that of the rearwardly sloping front, to let the customer get close with his feet under the front of it so that he could more easily reach the merchandise.

Q. Would it serve also the same function as the kickstand in connection with Defendants' Exhibit A? [199] A. Yes.

Q. Would you say that an overhang on the one hand, such as shown in the stipulation, which is in front of you, the kickstand such as we have in Defendants' Exhibit A as a sloping lower front wall

(Testimony of Donald Lippincot.)

as shown at E in Plaintiff's Exhibit 3, that all of those are primarily utilitarian functions?

A. I think so.

Q. And is their utility something obvious or something unobvious?

A. It is quite obvious to me.

Q. Do you know whether or not the Cameron and Patriarca patents were simultaneously pending in patent office?

A. Yes, I have examined certified copies of the file wrappers of both patents.

Q. Do you know whether or not they were examined by the same patent examiner or by different patent examiners?

A. They would be examined by different patent examiners. There are different signatures on the office actions and they were in different divisions of the patent office.

Q. Now by different divisions, could you elaborate on that a little bit more? Where was the Cameron Design Patent examined?

A. It would have been examined in a division of the patent office that considers only Design Patents.

Q. And the Mechanical Patent, Patriarca Patent 2735739, would have been examined in some other division of the patent [200] office?

A. It would have been examined in the division that considers Mechanical or Utilitarian Patents.

Q. Now you have stated that you have examined the certified copies of the file wrappers of the two patents. Do those documents reveal whether or not

(Testimony of Donald Lippincot.)

either examiner knew of the pendency of the other patent?

A. They would indicate to me that neither one did know of the existence of the other co-pending application.

Q. Were both patent applications, the one which matured into the Cameron Design Patent and the other that matured into the Patriarca Mechanical Patent,—were they handled by the same attorney?

A. They were.

Q. Is that his name that appears in the lower right-hand corner of the two exhibits, Plaintiff's Exhibits 2 and 4?

A. The signature is the same as that on the prosecution documents.

Q. Would you say that there was anything unusual about the prosecution of the two patent applications, one maturing into the Cameron Design Patent and the other the Patriarca Mechanical Patent?

A. Yes, there is something quite unusual to me.

Q. Would you explain it?

A. We have two patents, the figures one of the two patents [201] are very nearly identical. The one is presented as a Utilitarian Patent whose purpose is purely functional.

Q. Which is that?

A. That is the Patriarca Patent.

Q. Yes?

A. The other is an ornamental design. It is presented as something which is beautiful and aesthetically pleasing without regard to what it is made of

(Testimony of Donald Lippincot.)

or what its purpose is. The Mechanical Patent, the Patriarca Patent, was the first filed; it was filed in November of '51. The Cameron Patent is filed in May, '52—roughly six months later. They are presented by different inventors, and if the Patriarca Patent had issued first, it would undoubtedly have been a complete reference against the Cameron Patent. The patent office had no knowledge of this. With a design, an identical design presented by a different party with an earlier filing date, the situation is at least unusual. The same attorney filed them, and no doubt he knew that at least there was a claim that the design was invented by one man and the—that is, that the design invented by one man was invented by him prior to the mechanical features invented by the other. But the same features are claimed as novel in both of the applications, and it would seem to me that it might have been better for the validity of both patents if the patent office had been informed as to what the situation was there, and that the two [202] cases were pending. There is no claim in a Design Patent except the formal claim, which always reads the same. It is not a case where you could present identical claims and get into an interference between the two parties. But there certainly are so many common features that it is remarkable that two patents would issue covering the same features, as in one case, features that contributed to the beauty of the case, and in another patent, another application, as features which were purely utilitarian.

(Testimony of Donald Lippincot.)

Mr. Gregg: I would like to interrupt the examination for just a moment to offer in evidence Defendants' Exhibits N through S; that is the group of patents as to which Mr. Lippincot testified.

The Court: With no objection, they will be admitted into evidence in accordance with the letters with which they have been marked for identification.

(Whereupon the Defendants' Exhibits N through S for identification were received in evidence.)

[See Book of Exhibits.]

Mr. Gregg: The Design Patent, the Cameron, was filed approximately six months after the Patriarca Patent, the respective date being May 7, 1952, in the case of the Design Patent, and November 16, 1951, in connection with the Mechanical, Patriarca Patent. Now in accordance with your experience as a patent attorney, and had you been soliciting the two cases and been in the position of calling to the [203] attention of the examiner in the case of the Cameron Patent, or Cameron Patent Application, the fact that the Patriarca Patent Application was co-pending and had been filed about six months earlier, would you have anticipated that the examiner would reject the Cameron Application? A. I would.

Q. That he would refuse to allow it?

A. I would. He might have required affidavits swearing back of the date of the Patriarca Patent.

Q. In other words,—

(Testimony of Donald Lippincot.)

A. Such a rejection could have been overcome, but undoubtedly it would have resulted in a primary rejection.

Q. How could it have been overcome?

A. If the inventor, if Patriarca, had made——

Q. I would like to call your attention to the fact that Cameron is later in filing date than Patriarca.

A. Excuse me. If Cameron had filed an affidavit under the rule,—I forget what it is in the new code—swearing back of the date of Patriarca's invention, since they were not claiming the same invention, it might have been proper to allow it.

Q. But no such affidavit was filed, is that correct?

A. But no such affidavit was filed. [204]

* * * * *

Mr. Gregg: I would like to have a copy of the Hoare Patent, 542745, marked as Defendants' Exhibit next in order.

The Court: Defendants' T.

(Whereupon the Hoare Patent, 542745, referred to above, was marked for identification as Defendants' Exhibit T.) [208]

* * * * *

The Clerk: Do you want T in evidence?

Mr. Gregg: T is what? I would like to offer Exhibit T in evidence.

The Court: That is the Hoare Patent. Do you want that in evidence?

Mr. Gregg: Yes.

The Court: That will be admitted into evidence.

(Testimony of Donald Lippincot.)

(Whereupon Defendants' Exhibit T for identification was received in evidence.) [222]

[See Book of Exhibits.]

* * * * *

Cross Examination

Q. (By Mr. Mellin): Mr. Lippincot, did you aid in the preparation of this case for trial?

A. To this extent. I was given copies of the file wrapper, I was given copies of the references that have now become the exhibits, and I naturally talked over the nature of the facts [223] that were developed in this. I had nothing to do with it other than in connection with my own testimony.

Q. I see. Now, commencing with the time that you were with Jensen and Magnavox and even prior to that time, and even while you were in the service, practically all of your active professional life has been very closely associated with electric and electronic equipment, radio and so on, isn't that correct?

A. A great deal of it has been in that field.

Q. In fact, substantially all of it, isn't that a fact?

A. No, I can't say that. Because I had a good deal to do, in the years when I was running a private development laboratory as partner in a patent development or promotion of patented inventions, inventions of all characters came before me from—well, one of them that I remember was a non-loosening hammerhead, and from there all the way

(Testimony of Donald Lippincot.)

to most elaborate electronic inventions. In the period of time when I was working with motor protective devices, I had a great deal to do with convective currents, the loss of heat and heat flow. And similarly, I had a good deal to do with the development where electronics impinge on these other affairs. While I was in the army, I had considerable to do with the development of radio sounds and the measurement of humidity in transmitting the returns by radio.

Q. What I was actually getting at is, were you ever in the [224] retail business where they sold cigars?

A. I haven't been. I not only was never in the retail business where they sold cigars, but I do not even smoke cigars.

Q. Now, as a matter of fact, if someone hadn't told you, you wouldn't have known whether any of these cabinets in here were to display cigars or cheese, would you?

A. No. They probably would make very good cheese display cabinets.

Q. Now you have mentioned a lot of prior art devices, Mr. Lippincot. Which one patent would you say, in your opinion, and including this Exhibit A, this prior use, which one cabinet shown by those would you say most closely resembles what we have been calling this Patriarca cabinet?

A. If we are talking about the Cameron Patent on the Patriarca device, I would think that prob-

(Testimony of Donald Lippincot.)

ably the Rosenberg looks as much like it as any other. [225]

* * * * *

Q. (By Mr. Mellin): You heard counsel mention that there was a stipulation that the invention date of Cameron carried back to September of 1951, prior to November, 1951, the filing date of Patriarca Patent. In the light of those facts, the Patriarca Patent would not have been a proper reference against Cameron, would it?

A. As I stated, I believe——

Q. You can answer that yes or no, can't you?

A. No, it would not.

The Court: He can, and then explain it.

Mr. Mellin: Then explain it, certainly.

Mr. Gregg: Just a second, your Honor.

The Court: If it is capable of yes or no answer.

Mr. Gregg: I don't think there is any stipulation in that regard. There was an answer to an interrogatory giving that September, 1951, as the date. We didn't stipulate that the Cameron invention was made——

Mr. Mellin: All right. [226]

Q. (By Mr. Mellin): You heard Mr. Patriarca testify yesterday that he and Mr. Cameron worked and completed this thing in September. Now under those circumstances, if the Cameron invention were completed prior to the filing date of Patriarca, under no circumstances could have been a reference against Cameron, a proper reference?

A. Not a proper reference, no.

(Testimony of Donald Lippincot.)

Q. That's right. Now there likewise is a rule of law, isn't there, that you are familiar with, and you have been testifying indirectly to, that in order to be double patenting, the claim of one patent must include the device of the earlier expiring patent?

A. That's correct.

Q. All right. Now you heard counsel yesterday read a part of a claim of the Patriarca Patent and ask the witness if that didn't describe the Cameron artistic design. You heard that, didn't you?

A. I did.

Q. Can you infringe a part of a claim, Mr. Lippincot?

A. Well, frankly, it would appear to me that your opinion is that you can, because if you can take a device that reads on the Cameron Patent and go out and buy a humidifier in the open market and put it on the bottom when you know the device would need a humidifier, it appears to me that you would find yourself in the position of infringing the patent. You see my [227] point?

Q. Well, you would also have to put a perforated shelf on it, wouldn't you, in the Cameron design?

A. If you will notice that design, you will also notice that what is apparently perforated shelves in one is shown in substantially the same manner as perforated shelves in the other.

Q. Aren't those lines shading?

The Court: Which lines?

The Witness: Which lines?

(Testimony of Donald Lippincot.)

Q. (By Mr. Mellin): The shading lines?

The Court: Which shading lines?

Q. (By Mr. Mellin): Well, for example, you notice on the description here it is shown as perforations. You don't find that in the Cameron, do you?

A. I interpret them in the same way. The cross-hatching looks to me like a variance that would come only as between two drawings made by the same of different draftsmen.

Q. All right. Now in order that you indicate a cabinet just exactly as shown in the Cameron, without a humidifier, and did not use a humidifier with it, it doesn't come within the scope of the claims of the Patriarca Patent, does it? A. No.

Q. And in other words, to be double patented, you would have to come within it? [228]

A. That's correct. [229]

* * * * *

Q. Now you heard the testimony as to what this cabinet accomplished. I am going to ask you a hypothetical question. Assuming that a cabinet of this type comes out and forthwith increases the sales of cigars in the hands of its users somewhere in the area between 30 and 50 per cent; would that to you be one indication that something had been done beyond the skill of an ordinary mechanic?

A. Not necessarily.

Q. Why do you say that?

A. Because there are a great many things which develop in the course of industry that are not pat-

(Testimony of Donald Lippincot.)

entable, that are arrived at step by step, and when the final step is taken that makes for commercial success, we have shown commercial success—we haven't shown what other factors enter into it. It might be one factor that would indicate that an invention might have been made, but it certainly would not show that an invention had been made.

Q. No, no, I say it would be one factor that would indicate an invention might have been made. Now——

A. As I remember the rules of law——

Q. Well, I am not—let's not speak about rules of law.

A. Well, I am stepping out of my proper function at the moment.

Q. You are now going into the role of an advocate, are you? [230]

A. No, I am not going into the role of an advocate.

Mr. Gregg: You have been asking him about rules.

Mr. Mellin: I didn't ask him about a rule of law. I asked him if that wouldn't indicate it.

Q. (By Mr. Mellin): I want to add one more assumption, Mr. Lippincot, and that is, if there had been many attempts to obtain a result over a period of years and there was an actual problem presented, isn't that another indication that an invention might have been made?

A. It is an indication that an invention might have been made, yes. I want to be sure I understand

(Testimony of Donald Lippincot.)

that, Mr. Mellin. Your question is, as I take it: If the device or whatever is produced satisfies a need,—— [231]

* * * * *

[Endorsed]: Filed August 20, 1957.

[Endorsed]: No. 16440. United States Court of Appeals for the Ninth Circuit. Patriarca Mfg. Inc., a corporation, Domenico Patriarca and Donald A. Cameron, Appellants, vs. Melvin Sosnick, Marvin Sosnick and Peter Sosnick, a co-partnership doing business as Melvin Sosnick Co., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 17, 1959.

Docketed: April 21, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16440

PATRIARCA MFG., INC., et al., Appellants,

vs.

MELVIN SOSNICK, et al., Appellees.

PATRIARCA MFG., INC., et al., Appellants,

vs.

ALFRED AUSTRUY, an individual, et al.,
Appellees.

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

1. The District Court erred in not holding Design Letters Patent No. D 168,288 valid.

2. The District Court erred in holding that Design Letters Patent No. D 168,288 is lacking in invention.

3. The District Court erred in holding that the Royal showcase is the same in appearance as the showcase design disclosed in Design Letters Patent No. D 168,288.

4. The District Court erred in not holding that the showcases sold and used by appellees herein

were infringements of Design Letters Patent No. D 168,288.

Dated: May 22, 1959.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 25, 1959. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes Now appellants above named and designate the following portions of the record, proceedings and evidence to be contained in the record on appeal.

1. Amended Complaint.
2. Answer.
3. Stipulation Re Answer.
4. Defendants' Notice of Additional Defenses.
5. Memorandum For Judgment.
6. Findings Of Fact, Conclusions Of Law And Judgment.
7. Notice Of Appeal.
8. Bond For Costs On Appeal.
9. Concise Statement Of Points On Which Plaintiffs Intend To Rely On Appeal.

10. This Designation of Contents Of Record On Appeal.

11. The following portions of the Reporter's Transcript of proceedings taken at the trial of this cause on January 16 and 17, 1957: Page 4, line 23 to page 5, line 10; page 13, line 2, words "Mr. Mel-lin:"; page 13, line 5, commencing with words "I will" to line 10; page 24, line 12 to page 41, line 13; page 42, line 3 to page 52, line 9; page 68, lines 6 to 12; page 78, line 12 to page 85, line 6; page 87, line 25 to page 88, line 14; page 89, line 9 to page 90, line 15; page 92, line 5 to page 134, line 14; page 136, line 6 to page 171, line 22; page 173, line 24 to page 175, line 17; page 175, lines 22 to 24; page 176, line 4 to page 180, line 17; page 181, line 4 to page 183, line 10; page 184, line 4 to page 193, line 22; page 193, line 12 to page 204, line 23; page 208, lines 18 to 22; page 222, lines 6 to 14; page 223, line 20 to page 225, line 16; page 226, line 8 to page 229, line 1.

12. Appellants' Exhibits 1, 2, 6, 7, 8, 9, 11, 12, 15, 16 and 17.

13. Appellees' Exhibits B, C, D, E, F, G, I, J, K, L, M, N, O, P, Q, R, S and T.

Dated: May 22, 1959.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 25, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF RECORD ON APPEAL

Comes Now, appellees above named, and designate the following additional portions of the transcript of the proceedings to be contained in the record on appeal:

Page 41, line 14 through page 42, line 2;

Page 230, line 2 through page 231, line 13.

Dated this 29th day of May, 1959.

ECKHOFF AND SLICK,
/s/ By DOUGLAS T. CORBIN,
Attorneys for Appellees.

[Endorsed]: Filed June 1, 1959. Paul P. O'Brien,
Clerk.

No. 16,440

IN THE

United States Court of Appeals
For the Ninth Circuit

PATRIARCA MFG., INC., a corporation, DOMENICO
PATRIARCA, an individual, and DONALD A.
CAMERON, an individual,

Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK, and PETER
SOSNICK, a copartnership, doing business as
Melvin Sosnick Co., and MELVIN SOSNICK,
MARVIN SOSNICK and PETER SOSNICK, individ-
uals, and ALFRED AUSTRUY, an individual,

Appellees.

BRIEF FOR APPELLANTS

MELLIN, HANSCOM & HURSH,

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

391 Sutter Street,

San Francisco 8, California,

Attorneys for Appellants.

FILED

NOV 24 1959

PAUL F. O'BRIEN, CLERK



Subject Index

	I	Page
Statement of the pleadings and jurisdiction		1
	II	
The parties		3
	III	
Statement of the case		4
	IV	
Specification of errors		5
	V	
Summary of argument		6
	VI	
Argument		7
1. Commercial success is the most important and reliable objective test of invention in the present design patent		7
2. The commercial success of plaintiffs' showcase is due almost entirely to the effect of the design thereof		12
3. The widespread copying of plaintiffs' design by com- petitors further emphasizes the validity of the design patent		19
4. Defendants' copying of the design of plaintiffs' pat- ent emphasizes the validity thereof		22
5. The patented design of plaintiffs' showcase differs from the prior art showcases and is beyond the skill of an ordinary designer in the art		26
6. Defendants clearly infringe plaintiffs' patent		33
	VII	
Conclusion		34

Table of Authorities Cited

Cases	Pages
Aghnides v. S. H. Kress & Co., 140 F. Supp. 582 (D.C. N.C., 1956)	21
Alford Cartons v. Gordon Cartons, Inc. et al., 121 F.Supp. 363 (D.C. Md., 1954)	25
Anderson Company v. Sears Roebuck & Co., 165 F.Supp. 611 (D.C. Ill., 1958)	24
Application of Lange, 228 F.2d 245 (C.C.P.A., 1955)	12
Coltman v. Colgate-Palmolive-Peet Co., 104 F.2d 508 (CCA-7, 1939)	21
Gold Seal Importers v. Morris White Fashions, 124 F.2d 141 CCA-2, 1941)	34
Joseph v. Donover Company, 261 F.2d 812 (CA-9, 1958) ...	13
Jungersen v. Ostby & Barton Co., 335 U.S. 560	12
Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541 (CA-9, 1949)	26
Pointer v. Six Wheel Corp., 177 F.2d 153 (CA-9, 1949)	12
Robert W. Brown & Co., Inc. v. De Bell, CA-9, 243 F.2d 200 (1957)	10, 12, 19
Sel-O-Rak Corp. v. Henry Hanger & Display Fixture Corp. of America, 232 F.2d 176 (CA-5, 1956)	28, 32
Standard Match Corp. v. Bell Mach. Co., 83 F.2d 365 (1936)	11, 12
Vacheron & Constantin-Le Countre Watches, Inc. v. Benrus Watch Company, Inc., 155 F.Supp. 932 (D.C. N.Y., 1957)	21

Codes

28 U.S.C.:	
Section 1291	3
Sections 1338(a) and 1400(b)	2

No. 16,440

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PATRIARCA MFG., INC., a corporation, DOMENICO
PATRIARCA, an individual, and DONALD A.
CAMERON, an individual,

Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK, and PETER
SOSNICK, a copartnership, doing business as
Melvin Sosnick Co., and MELVIN SOSNICK,
MARVIN SOSNICK and PETER SOSNICK, individ-
uals, and ALFRED AUSTRUY, an individual,

Appellees.

BRIEF FOR APPELLANTS

I

**STATEMENT OF THE PLEADINGS
AND JURISDICTION.**

This action was commenced in the United States District Court for the Southern Division of the Northern District of California by the filing of a complaint, later amended (R. 3), alleging that appellees, Melvin Sosnick,

Marvin Sosnick and Peter Sosnick,¹ were infringing Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739 owned by appellants, Patriarca Mfg., Inc., Domenico Patriarca and Donald A. Cameron.² Appellants also filed a complaint, later amended (R. 8), against appellee, Alfred Austruy,³ charging infringement of the same Letters Patent.

Appellees, Melvin Sosnick, Marvin Sosnick and Peter Sosnick and appellee, Austruy, filed separate answers. (R. 13 and R. 20, respectively.)

The United States District Court had jurisdiction under Title 28, §§1338(a)⁴ and 1400(b).⁵

The District Court (Carter, D. J.) found in favor of the defendant, and entered its Findings of Fact and Conclusions of Law (R. 39) on February 11, 1959 and its Judgment (R. 46) on February 13, 1959.

On March 10, 1959, within thirty (30) days following the entry of the Judgment, plaintiffs filed their notice of Appeal (R. 47) and an Appeal Bond (R. 48).

^{1, 3}Appellees Melvin Sosnick, Marvin Sosnick, Peter Sosnick and Alfred Austruy are hereinafter designated as "defendants".

²Appellants are hereinafter designated as "plaintiffs".

⁴Title 28, § 1338 U.S.C. "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

⁵Title 28, § 1400 U.S.C. "(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business. June 25, 1948, c. 646, 62 Stat. 936."

Jurisdiction of this Court is invoked under Title 28, § 1291 U.S.C.⁶

II

THE PARTIES.

Plaintiff-appellant, Patriarca Mfg. Co., is a corporation of Rhode Island and has its principal place of business in the City of Providence, State of Rhode Island. Plaintiffs-appellants, Domenico Patriarca and Donald A. Cameron, are individuals and residents of the City of Cranston, State of Rhode Island.

Defendants-appellees, Melvin Sosnick, Marvin Sosnick and Peter Sosnick, are individuals, are residents of the City and County of San Francisco, State of California, do business as a co-partnership under the name and style of Melvin Sosnick Company, in the City and County of San Francisco, State of California, and are primarily engaged in distributing and jobbing cigars, cigarettes, candies, and the like. Defendant-appellee, Alfred Austruy, is an individual residing in the City and County of San Francisco, State of California, and does business in the City and County of San Francisco, State of California, including inter alia, the selling of cigars.

⁶Title 28, § 1291 U.S.C. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

III

STATEMENT OF THE CASE.

These are suits for infringement of Letters Patent No. Des. 168,288, granted December 2, 1952 to Donald A. Cameron for "Self-service Display Container", and for infringement of Letters Patent No. 2,735,739, granted February 21, 1956 to Domenico Patriarca for "Self-service Display Cabinet".

At the time of the filing of the suits, plaintiff, Donald A. Cameron, owned an undivided one-half interest in the design patent No. Des. 168,288, plaintiff Domenico Patriarca owned an undivided one-half interest in the design patent and complete interest in the mechanical patent No. 2,735,739, and plaintiff, Patriarca Mfg. Inc., a Rhode Island corporation, had an exclusive license to manufacture, use and sell the invention covered in both the design and mechanical patents.

Defendants Sosnick, who are primarily engaged in distributing and jobbing cigars, cigarettes, candies and the like, sold the accused cigar showcase to defendant Austruy who then used the showcase in displaying and selling cigars.

Upon learning of this sale and use, plaintiffs filed separate complaints, one against the defendants Sosnick and one against defendant Austruy, charging plaintiffs' design and mechanical patents to be infringed by defendants' activities. The two suits were consolidated for trial.

The trial Court held both the design patent No. Des. 168,288 and the mechanical patent No. 2,735,739 to be invalid. No determination was made as to whether defendants' activities infringed either patent.

The holdings and findings of the trial Court concerning the design patent No. Des. 168,288 are now appealed.

In brief, the questions for determination here are:

- (1) Is the design patent valid?
- (2) Is the design patent infringed by defendants?

IV

SPECIFICATION OF ERRORS.

The following errors are specified as those which will be urged in support of this appeal:

1. The District Court erred in holding that Design Letters Patent No. Des. 168,288 is lacking in invention.

2. The District Court erred in not holding Design Letters Patent No. Des. 168,288 valid.

3. The District Court erred in disregarding the effect of commercial success on the validity of Design Letters Patent No. Des. 168,288.

4. The District Court erred in not finding that the commercial success of plaintiffs' showcase embodying the design of Letters Patent No. Des. 168,288 was due substantially, if not entirely, to the patented design of the showcase.

5. The District Court erred in disregarding the emphasis of validity of Letters Patent No. Des. 168,288 which arises from the extensive copying of the design thereof by competitors.

6. The District Court erred in disregarding the emphasis of validity of Letters Patent No. Des. 168,288 which

arises from the slavish copying of the design thereof by the defendants.

7. The District Court erred in holding that the Royal showcase is the same in appearance as the showcase design disclosed in Design Letters Patent No. Des. 168,288.

8. The District Court erred in not holding that the showcases sold and used by appellees herein were infringements of Design Letters Patent No. Des. 168,288.

V

SUMMARY OF ARGUMENT.

1. Commercial success is the most important and reliable objective measurement of invention in the present design patent.

2. Plaintiffs' showcase was clearly commercially successful. The evidence further shows that the commercial success of plaintiffs' showcase was due almost entirely to the effect of its design rather than to the mechanical efficiency thereof, and the Court was clearly in error in not so finding. The commercial success attributable to the design of plaintiffs' showcase clearly emphasizes the validity of the patent in suit.

3. The widespread copying by others of the design of plaintiffs' showcase, together with their acquiescence in the patent by accepting license agreements thereunder, further emphasize the validity of the patent.

4. The copying of the details of plaintiffs' showcase, down to the fraction of the inch, into the accused show-

case sold and used by defendants is a clear showing of their recognition of plaintiffs' invention. Such precise copying also shows that defendants were afraid to risk losing any of the visual effects of the size, proportion or harmony of the inventive design of plaintiffs' showcase by making any variations at all therefrom.

5. Plaintiffs' showcase differs in appearance from the prior art showcases, and it is beyond the ordinary skill of a showcase designer to assemble the individual details of prior art showcases into the well-proportioned and harmoniously arranged showcase covered by plaintiffs' patent.

6. The slavish copying of plaintiffs' showcase which was sold and used by defendants constitutes an obvious infringement of plaintiffs' patent rights, which the Court should have found.

VI

ARGUMENT.

1. COMMERCIAL SUCCESS IS THE MOST IMPORTANT AND RELIABLE OBJECTIVE TEST OF INVENTION IN THE PRESENT DESIGN PATENT.

The basic requirement for the validity of a patent is that there be "invention" present. In this regard, design patents stand on the same footing as utility, or mechanical, patents. A design, in order to support a valid patent, must possess that indefinite element of invention in precisely the same manner that a mechanical device must display invention before the inventor is entitled to patent protection.

In any decision as to whether a mechanic or designer is to be awarded a patent for his efforts, the quality of the invention must be considered. The same is true in a later reappraisal of the validity of a patent. The quality of the invention must again be examined to see if the initial patent grant was correct.

In order to remove the question of invention from a purely subjective consideration, the objective features of an invention should be examined. In mechanical inventions, the performance of the device can always be measured and can be compared concretely with the performance of prior art devices. Measurements of efficiency may be made. Speeds, weights, tensions can be measured and compared. Dollar savings in production costs can be computed or estimated with fair precision.

Thus, with mechanical devices, measurable comparisons of the old with the new can serve as guides in deciding whether the new device is patentably inventive. With such guides it becomes easier to decide if improved results are a consequence of invention or of routineering. As an example, suppose a water tank is invented which is 25 percent more effective against leakage than any previous tanks. Such an increase in water-tightness could well indicate invention if only old elements were used in building the tank with the water-tightness resulting from a particular way of combining these elements. Then again, suppose instead that a new plastic lining had been used in place of the normal tank lining and that the new plastic lining itself was 25 percent more impervious to leakage than before. These measurements would then indicate that there is no inventive improvement in the tank, but that instead, the improvement lay in the lining.

Thus, measurements of the physical characteristics of a device can be very useful in determining whether a device embodies mechanical invention or not. On the other hand, when we wish to consider the quality of the artistic design of the device, these measurements become meaningless. The output-to-input efficiency is independent of the artistic features of the device. The design cannot be weighed, and the temperature of the design is completely irrelevant. However, this does not mean that there are no guides at all to be used. Rather, there is a very important objective consideration in examining the merits of any design.

Briefly put, all designs are created for a definite purpose. The degree of achievement of this purpose is a measure of the effectiveness of the design, and is a measure of the "invention" of the design. For example, a painting is designed to draw attention to itself, and the effectiveness of a painting can generally be determined by the way in which it holds the viewer's attention. Among many paintings hanging side by side, the effective paintings will attract the viewers away from the ineffective. Such results are easy to measure.

Then again, the designer's skill may be used in the field of packaging. Here the primary purpose is to create a desire in the public to buy the packaged article. An attractive container placed alongside a common uninspired package will sell itself time after time, even though the contents are precisely the same. In this field, the degree of achievement can be easily measured by the commercial success of the item. Indeed, this is the only way in which the public response can be ascertained, short of an ex-

haustive poll wherein each person is asked his opinion of the effectiveness or inventiveness of the new design.

Coming to the present case, plaintiffs' showcase was created for only one purpose—to sell cigars. To accomplish this, the showcase must first attract the buyer to look at the display of cigars in the case and must then present such a pleasing picture that the customer wants to buy a cigar.

The degree of effectiveness of plaintiffs' showcase can be measured. This effectiveness is measured by its ability to sell cigars. This is the purpose intended by its inventor and this is what it does.

Evidence as to commercial success is not merely a makeweight in determining whether a design patent is valid or not. Instead, such evidence is the only objective way in which the effectiveness of the design of a commercial device can be measured. If commercial success is set off to one side, then no objective way at all remains in which the inventive quality of a showcase design can be determined.

This Court has recognized the value of commercial success in the consideration of validity of design patents. For example, in *Robert W. Brown & Co., Inc. v. De Bell*, CA-9, 243 F.2d 200 (1957), this Court stated:

“Commercial success is of great importance in determining the validity of a design patent. *Glen Raven Knitting Mills, Inc. v. Sanson Hosiery Mills, Inc.*, 4 Cir., 189 F.2d 845. This is so because the objective of most such designs is to enhance saleable value. The realization of this objective shows that the design must have been sufficiently novel and superior to attract attention.”

The same consideration of commercial success is found in other circuits. In a Seventh Circuit case, *Standard Match Corp. v. Bell Mach. Co.*, 83 F.2d 365 (1936), the Court said:

“... Whether a design which is novel and ornamental is entitled to coverage by a design patent depends to a large degree upon the reception which those for whom it is made, accord it. If pleasing to the eye and acceptable to the trade as evidenced by extensive sale, we would naturally be inclined to uphold it. In so doing we are not delegating judicial powers to others, but rather applying *a test of patentability*. In short, we are answering the question—Is the design so unique and winning in appearance as to entitle its originator to recognition as an inventor?” (Emphasis added.)

The Trial Court erred in disregarding the commercial success of plaintiffs' showcase. The Trial Court correctly stated the rule at R. 37 as follows:

“It is also true that in considering the validity of a design patent, evidence of commercial acceptance of the design, is relevant to the issue of invention:

‘Whether a design which is novel and ornamental is entitled to coverage by a design patent depends to a large degree upon the reception which those for whom it is made, accord it.’

Battery Patents Corp. v. Coe, 93 F.2d 220, 226, . . . (D.C. Cir. 1937), quoting from *Standard Match Corp. v. Bell Mach. Co.*, 83 F.2d 365, 367, . . . (7 Cir. 1936).”

The Trial Court then went on to conclude that such commercial success is of use only when the question of validity is a close one. In support of this view, the Court

relied upon *Pointer v. Six Wheel Corp.*, 177 F.2d 153 (CA-9, 1949), *Application of Lange*, 228 F.2d 245 (C.C. P.A., 1955) and *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560. *All of these cases deal with mechanical patents. None involves a design patent.* The *Six Wheel* case concerns a six-wheel attachment for motor vehicles, the *Lange* case involves a mechanical patent for a cut flower holder, and the *Jungersen* case deals with a method for casting by the lost wax process.

It is submitted that the Trial Court erred in applying the usual rule of utility patents regarding the value of commercial success to the present situation involving a design patent. Instead of dismissing the evidence of commercial success as a mere makeweight, the Trial Court should have considered this evidence of prime importance in determining the validity of plaintiffs' design patent. By doing so, the Court below would have then followed the law as expressed by this Court in the *De Bell* case and by the Seventh Circuit in the *Standard Match* case.

2. THE COMMERCIAL SUCCESS OF PLAINTIFFS' SHOWCASE IS DUE ALMOST ENTIRELY TO THE EFFECT OF THE DESIGN THEREOF.

The Trial Court found commercial success of plaintiffs' showcase to be clearly established, which finding is of course clearly borne out by the evidence. Marcus Glaser, a leading West Coast cigar distributor, testified that cigar sales by retailers increased an average of 51 percent upon use of plaintiffs' showcase. (R. 99.) Indeed, Mr. Glaser testified that he offered to give the showcase with-

out charge to a cigar retailer if his cigar sales did not increase 30 percent by its use. (R. 99.)

The Trial Court erred, however, in holding that plaintiffs did not demonstrate to what extent the commercial success was due to the design itself and how much was due to mechanical efficiency or other factors.

It is true that plaintiffs have not shown a fixed percentage of the commercial success to be due to the inventive design, with the remainder being due to the mechanical efficiency or to other factors. Indeed, it would be impossible to say that a certain exact percent of the commercial success is due to the design aspects of the showcase, and a certain exact percent is due to the mechanical features.

However, plaintiffs submit that the inference to be drawn from all of the testimony is that the commercial success of plaintiffs' showcase is due substantially, if not entirely, to the design features of the showcase, and that the Trial Court was clearly mistaken in not so holding.

The present Court in *Joseph v. Donover Company*, 261 F.2d 812 (CA-9, 1958), at page 824, stated:

“We fully agree with and follow the Supreme Court case cited and quoted by appellant, *United States v. United States Gypsum Co.*, 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, that:

‘A finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’ ”

Mr. Glaser (whom the Trial Court recognized as “an expert in the field of cigar showcases”) testified at R. 100-102 as to the nature of cigar showcases and the pur-

chasing public. In stressing the necessity for the proper display of cigars, Mr. Glaser pointed out that "most of cigar sales are what you call point of sale purchases". That is, most of the cigar sales to the public are spur of the moment, spontaneous purchases.

If the showcase does not have the attractiveness to make a man want to buy, no sale will be made. As a corollary, if the showcase is designed so that it displays its contents more attractively and effectively, sales will increase.

The record is replete with testimony that the overall appearance of plaintiffs' cabinet was of paramount importance in attracting and creating customers. Particularly was this true regarding the initial impact of plaintiffs' overall design.

Mr. Patriarca testified as follows as to the initial reaction of a member of the Cigar Institute of America:

"The Cigar Institute of America directed Mr. Gene Raymond to fly from New York to Boston to take a look at the cabinet or the cigar humidor. As soon as he saw it he went wild. He was raving and full of compliments. He told me that they were having a convention, a cigar manufacturers convention in Atlantic City the following month or thereabout within a couple of weeks from the time we had this discussion, and he begged me to bring one cabinet to Atlantic City so that he could show it to cigar manufacturers. . . ." (R. 58.)

Mr. Glaser attended this convention and testified as follows:

"I was in the tobacco convention at Atlantic City, and in walking through some of the exhibits I came across this particular cabinet. To me it represented

the acme in cigar display and distribution, ability to keep the cigars moving, the cure-all—it was a cure-all for the cigar business, as I saw it, from the standpoint of consumer display and sales. . . .”

Other excerpts of Mr. Glaser’s testimony are as follows:

“When a man walks up to this case, you are now looking at 40 boxes of cigars in one shot. This gives him an adequacy of looking at what he wants to buy, and gives him his choice of sizes and shapes. It also gives him the feeling that this is not a junky piece of furniture lying there. A man can walk straight across to this counter, pull open that door, and he has a fresh cigar.” (R. 116-117.)

* * * * *

“There is nothing specific about the case except the over-all structure of it, the over-all feel of it, the over-all tone of it. Everything about it is good, and this is the first time this was conceived.” (R. 117.)

* * * * *

“. . . We know the over-all contour of this case, the look of it. Look yourself. Look, that is what a cigar case used to be. This is what a cigar case is. Look yourself, look at the over-all picture of this case. This is a creation.” (R. 119.)

* * * * *

“Yes. By the looks of the case, by the steps, by the cut of it, by the jib of it, by the doors, by its construction, by the way it is handled, by the way it looks in a man’s store, and by the fact that it is a beautiful piece of furniture, . . .” (R. 119.)

All of this enthusiasm of Mr. Glaser for the design of plaintiffs’ showcase does not arise due to any financial

return to Mr. Glaser through the distribution of the showcase, but instead arises because of the showcase's ability to sell his cigars.

This testimony points out clearly that the design, appearance and attractiveness of the patented showcase are the primary factors that induced customers to step up, inspect and buy cigars.

The Trial Court found that there was nothing mechanically new in plaintiffs' showcase. Specifically, the Court noted that plaintiffs' showcase comprises the following elements: a base, side walls, a rear wall, a top, a lower front wall, an upper front opening, sliding glass doors for the upper front opening, a series of support steps inside the showcase, and a humidifier. Specifically, the Court found that all of these elements were anticipated by the prior art.

In view of the finding, it becomes impossible to see how the Trial Court could attribute commercial success to the mechanical construction of plaintiffs' showcase. The commercial success instead arises from the particular manner in which these old elements were put together. That is, the particular design of these old elements is what creates the proven appeal of plaintiffs' cabinet.

Obviously, the Trial Court is mistaken in finding that plaintiffs' showcase is comprised of all old elements without then finding that the commercial success of the showcase must be due to the design of these old elements as assembled into a single unit.

Much testimony was also given as to the necessity for humidifying cigars in order to maintain cigars at a proper

freshness, and as to the humidifying aspects of plaintiffs' showcase.

It may be that the Trial Court had this testimony in mind when it said that plaintiffs have not divided the commercial success between the design and mechanical features of their showcase. If so, the Trial Court was mistaken.

First of all, humidifying a cigar showcase is not a new idea, as expressly found by the Trial Court. It follows, then, that plaintiffs' proven commercial success cannot be due to this old mechanical expedient.

Secondly, even if the idea of humidifying a cigar showcase were new, this would not cause a customer to be initially attracted to the cigars displayed in plaintiffs' showcase, for the humidifier is hidden from view. As stated by Mr. Patriarca:

“Q. (By Mr. Mellin). And that also concealed the humidifier?

A. That is right.” (R. 67.)

Testimony was also given as to the amount of money spent on advertising plaintiffs' showcase. (R. 60.) However, such advertising is completely irrelevant in regard to the effectiveness of plaintiffs' showcase in selling cigars. The advertising was directed to cigar distributors, wholesale and retail, and was not directed to the public. No attempts were made in advertising to induce the public to buy cigars from plaintiffs' showcases. Instead, such inducement came about strictly because of the effective design of plaintiffs' showcase.

By the same token, there was testimony as to the increase in advertising of cigars in general. (R. 109-110.) Again, such evidence cannot explain in any way why there should be a sudden sharp rise in sales of cigars from plaintiffs' showcases when installed.

Indicative of the ability of plaintiffs' showcase to increase the sale of cigars are the results tabulated in plaintiffs' Exhibit 17. (R. 219.) Thirty-six of plaintiffs' showcases were installed in different West Coast cities, from Los Angeles to Seattle, and accurate records were made of sales for 90 days before and 90 days after installation of each unit. In the 90 days before each installation, the total value of cigars sold was \$11,108. *After installation, sales went up in every instance.* In the 90 days following installation, total sales rose to \$16,844—an increase of over 50 percent.

From the record, the testimony shows clearly that the success of plaintiffs' cigar showcases in attracting customers and inducing them to buy cigars was due almost entirely to the inventive design and arrangement of plaintiffs' showcase. The Trial Court was clearly mistaken in not so holding.

The commercial success, which is so clearly attributable to the design of plaintiffs' showcase, should have been considered by the Trial Court as a positive indication of the validity of the design patent.

3. THE WIDESPREAD COPYING OF PLAINTIFFS' DESIGN BY COMPETITORS FURTHER EMPHASIZES THE VALIDITY OF THE DESIGN PATENT.

As recognized by this Court, slavish copying of a design by competitors indicates the validity of a design patent. In *Robert W. Brown & Co. v. De Bell, supra*, this Court stated:

“... The fact that the Bessolo design was widely copied by competitors is another indication that it was deemed a novel and superior design.”

In the present case, plaintiffs introduced as evidence (Plaintiffs' Exhibit 12, reproduced at R. 213) the following list of competitors prominent in the showcase field who attempted to duplicate plaintiffs' patented showcase. This exhibit further listed the response of these competitors to a notification by plaintiffs of patent infringement:

1. McKesson Robbins, N. Y., N. Y. (Stopped infringement and now sell Patriarca Humidor.)
2. Bowman Corp., Grand Rapids, Michigan. (Stopped infringement and now sell Patriarca Humidor.)
3. Wilkinson Co., Providence, R. I. (Stopped infringement and now sell Patriarca Humidor.)
4. United Fixtures, Providence, R. I. (Stopped infringement and now sell Patriarca Humidor.)
5. Modern Store Fixtures, Providence, R. I. (Stopped infringement and now sell Patriarca Humidor.)
6. H. E. Shore Company (Stopped infringement—subsidiary company at New Haven sell Patriarca Humidor.)
7. Bernheim-Siegel Store Fixture Co., Philadelphia, Penna. (Stopped infringement.)

8. Royal Showcase Co., San Francisco, California.
(Changed design.)

9. The Press & Union League Club, San Francisco, California. (Stopped infringement.)

10. Rubenfeld Showcase Co. (Advised changing design.)

11. Melvin Sosnick Co., San Francisco, California.
(Sued.)

12. Benedettis (Alfred Austruy), San Francisco, California. (Sued.)

13. Stan-Lee Cigar Store, San Francisco, California.

14. Broadmoor Liquor Store, San Francisco, California.

15. Terminal Drugs, San Francisco, California.

16. Don Minton, San Francisco, California.

17. American Showcase Co., Los Angeles, California.

18. Oakland Distributing Co.

19. East Bay Candy Co.

At the time of the filing of the complaints in the present suit, the concerns listed at 13-19 above had not been notified of infringement.

It is, of course, recognized that this evidence does not in itself establish the validity of the patent in question. However, it is submitted that the acceptance of plaintiffs' showcase design by the industry, the slavish copying thereof and then their acquiescence in plaintiffs' patent rights further emphasizes the validity of the patent. Like-

wise, this further emphasizes the clear error of the Trial Court in holding plaintiffs' design patent invalid.

In a recent case, *Aghnides v. S. H. Kress & Co.*, 140 F. Supp. 582 (D.C. N.C., 1956), the Court stated at page 584:

"It is difficult to ignore the valuation placed on the device in the commercial world. Business concerns are quick to discover and to acquire the rights to use gadgets and devices which give promise of commercial success. . . ."

A leading case on this point is *Coltman v. Colgate-Palmolive-Peet Co.*, 104 F.2d 508 (CCA-7, 1939). In this case the Court had the following to say:

"It must be conceded, however, that evidence of immediate, wide, and extensive use following the appearance of a patent may furnish invaluable evidence in cases which would otherwise be doubtful, and may well be described as more convincing and persuasive with courts than any other evidence save recognition by the trade and the payment of substantial royalties for a license to use the new patented discovery. Recognition by the trade is the best and most persuasive evidence that can be offered. The tribute of those engaged in the industries affected, especially when the tribute is evidenced by the payment of substantial royalties, is by far the most persuasive and unimpeachable evidence that can be offered to support the asserted validity of patent claims in litigation. . . ."

Referring specifically to design patents, the Court in *Vacheron & Constantin-Le Countre Watches, Inc. v. Benrus Watch Company, Inc.*, 155 F.Supp. 932 (D.C.N.Y., 1957), said:

“... While immediate imitation is not proof of invention, some weight must be given to the fact that as soon as plaintiff's watch was put on the market it was followed by the outbreak of a rash of similar products, each of which created the same impression of a piece of glittering jewelry from which, with a little application, one could ascertain the time of day and which yet did not have the appearance of the conventional wrist watch. I hold plaintiff's design patent valid.”

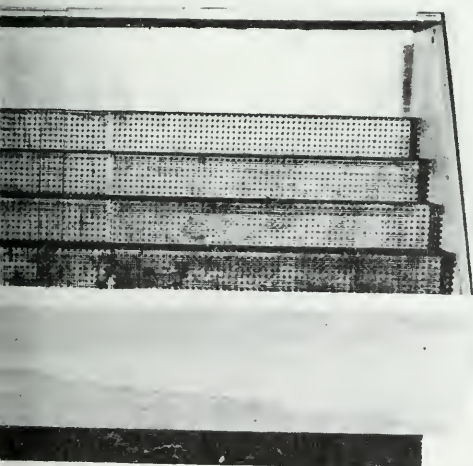
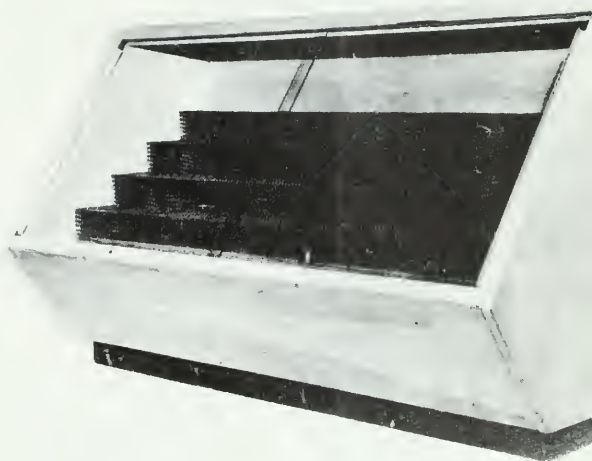
4. DEFENDANTS' COPYING OF THE DESIGN OF PLAINTIFFS' PATENT EMPHASIZES THE VALIDITY THEREOF.

In discussing this point, attention is invited to the illustrations opposite to this page, showing the three views of plaintiffs' design patent in suit, and the corresponding views of defendants' accused showcase. (Plaintiffs' Exhibit 10.)

The almost exact similarity of the accused showcase to the design patent drawings, indeed, the direct copying of plaintiffs' patent, is immediately apparent from these illustrations.

In addition, Mr. Patriarca testified as to the similarities of the accused showcase to a cabinet of plaintiffs' manufacture (Plaintiffs' Exhibit 5) which was constructed in accordance with the invention. This uncontroverted testimony graphically brought out defendants' copying as follows:

“Q. With respect to this accused humidor, Exhibit 10, will you state the differences, if any, and the similarities, if any, between it and the humidor



ACCUSED SHOWCASE

PUBLISHED BY THE

AMERICAN



disclosed in Exhibit 2, the design patent, as far as external appearances are concerned?

A. I would say it is the same.

Q. Would you say it is identical or different in any respect?

A. I would say that every line, touch and twist, the thing is exactly the same." (R. 64.)

* * * * *

"Q. Well, did you measure the cabinet with respect to one of your commercial cabinets?

A. Yes, I would say that it's close to a fraction of an inch.

Q. In other words, it is right to the fraction of an inch?

A. Yes.

Q. In length, width and height?

A. Yes." (R. 65.)

* * * * *

"Q. Are there any other differences in structural features, I mean of any importance?

A. No, I would not say so. I think the cabinet—they couldn't make them closer if they tried.

Q. In view of the fact that you measured the two and found their dimensions to be the same within fractions of an inch and their construction, and bear in mind also the fact that they do not elevate their humidor as high as it is shown elevated in the patent in suit, in your opinion as a cabinet-maker would you say one was a copy from the other?

A. Definitely." (R. 65-66.)

Defendants attempted to justify their copying by throwing up a cloud of prior art showcases, with the assertion that this prior art negatives any invention in plaintiffs' particular design.

Originally, defendants listed 37 different prior art showcases (32 United States patents, two foreign patents, one publication and two prior uses and sales) in their answers. This prior art was then weeded down to the nine cases discussed at the trial by Mr. Lippincot, defendants' expert witness. The gist of his testimony was that all of the details of plaintiffs' patented design were old and consequently the patent should be considered invalid.

Of these 37 prior art patents, publications and uses, only two showcases were protected by unexpired design patents. Thus, 35 prior art structures were fully available to defendants for their use. However, instead of using any one of these available showcases, defendants found it necessary to copy the patented design of plaintiffs' showcase, down to a fraction of an inch. The only excuse offered by them is to the effect that plaintiffs should not be entitled to the fruits of their labor.

The weakness of this position has been exposed before, as in the following excerpt from *Anderson Company v. Sears Roebuck & Co.*, 165 F.Supp. 611, 623 (D.C. Ill., 1958):

“The defendants give the prior art the tribute of their praise but they give the patent in suit the tribute of their imitation. Defendants' contention that the prior art devices would serve just as well as the patent in suit is refuted by the fact that they do not use any of these prior art devices, but instead manufacture and sell substantially a Chinese copy of the patented devices. Rubber Tire Case [*Diamond Rubber Company of New York v. Consolidated Rubber Tire Company*], 220 U.S. 428, 31 S.Ct. 444, 55 L.Ed. 527.”

In testifying, Mr. Lippincot was asked whether he would consider it obvious to modify the Royal showcase (Defendants' Exhibit A) in view of the showcases in various patents (Defendants' Exhibits N, O, P, Q, R, and S), and Mr. Lippincot stated that the modification would be obvious. There was no testimony that either Mr. Lippincot or the defendants had ever seen these prior art patents before the institution of the present suit.

This hindsight of defendants has also been condemned by the Courts. As for example, in *Alford Cartons v. Gordon Cartons, Inc. et al.*, 121 F.Supp. 363, 368-9 (D.C. Md., 1954), the Court stated:

"... Furthermore, this is not a case of an infringer who, prior to having seen a plaintiff's patent, has pieced together what the prior art has disclosed in various patents. But it is a case of an infringer who has done this piecing together only after he has seen the patentee's invention as disclosed by the patent. The imitation by another who denies invention of a patented device is strong evidence of what the imitator himself thinks of the patented device, and of what should be thought of it generally. See *Kurtz v. Bell Hat Lining Co.*, 2 Cir., 280 F. 277; *Black & Decker Mfg. Co. v. Baltimore Truck Tire Service Corp.*, 4 Cir., 40 F.2d 910; *Ackermans v. General Motors Corp.*, 4 Cir., 202 F.2d 642; *Enterprise Mfg. Co. v. Shakespeare Co.*, 6 Cir., 141 F.2d 916."

Contrary to what they now say, defendants' actions show clearly that they considered plaintiffs' showcase to be a great advance. Otherwise, why would they deliberately select and copy plaintiffs' patented design over all of the prior art showcases freely available to them?

Moreover, plaintiffs' showcase has been copied to the fraction of an inch "in length, width and height". What reason could defendants have for such slavish copying other than a fear that any variation from plaintiffs' design might lose the impact obtained from the sight of plaintiffs' harmoniously designed cabinet?

Plaintiffs submit that the sincere flattery of defendants' imitation is further convincing evidence of the validity of the design patent in suit, and further emphasizes the error of the Trial Court's holding of invalidity.

5. THE PATENTED DESIGN OF PLAINTIFFS' SHOWCASE DIFFERS FROM THE PRIOR ART SHOWCASES AND IS BEYOND THE SKILL OF AN ORDINARY DESIGNER IN THE ART.

The Trial Court held that the differences between the designs of plaintiffs' showcase and the prior art showcases, such as the Royal showcase, were within the ability of the ordinary designer in the field of display showcases.

This holding is clearly erroneous, and plaintiffs submit that this Court should rectify this error.

The designs of plaintiffs' patented showcase and the Royal showcase are undisputed and are obvious from an inspection of the illustrations on the opposite page. As such, this Court stands in as good a position as the Trial Court to compare these designs and to determine whether or not invention is present.

In *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 548 (CA-9, 1949), this Court said:

D. A. CAMERON
SELF-SERVICE DISPLAY CONTAINER

Filed May 7, 1952

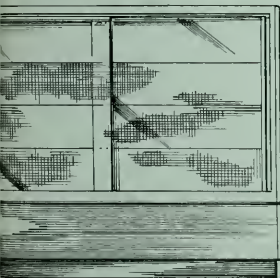
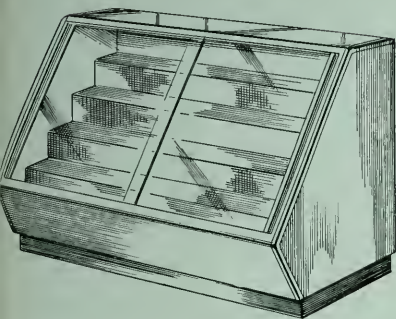
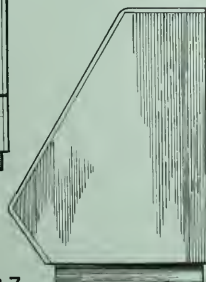


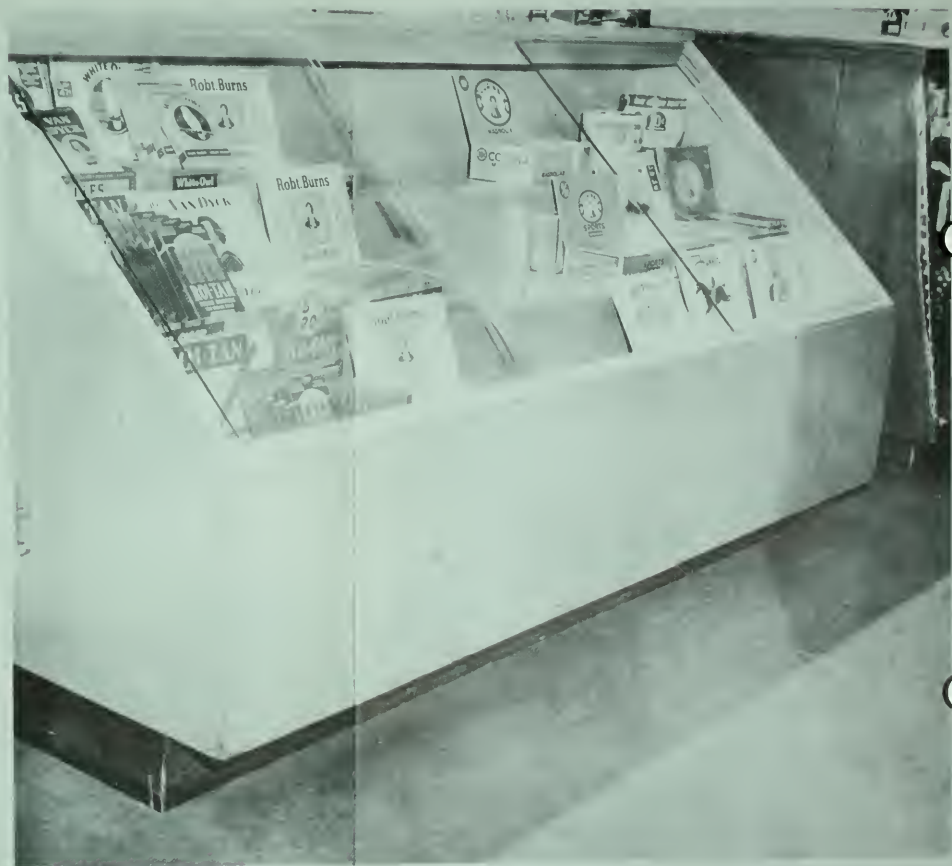
FIG. 3



INVENTOR.

BY *Donald A. Cameron*
Nathaniel L. Smith

Des. 168,288



THE ROYAL SHOWCASE.
DEFENDANTS' EXHIBIT K.

“As a corollary to this rule, we may make our own inferences from undisputed facts or purely documentary evidence. For, to use the colorful language of the Court of Appeals for the Third Circuit, the rule does not operate ‘to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.’ *Kuhn v. Princess Lida of Thurn & Taxis*, 3 Cir., 1941, 119 F.2d 704, 705. And see *Western Union Tel. Co. v. Bromberg*, 9 Cir., 1944, 143 F.2d 288, 290; *Home Indemnity Co. v. Standard Accident Ins. Co.*, 9 Cir., 1948, 167 F.2d 919, 922, 923.”

The Trial Court decided that plaintiffs’ showcase and the Royal showcase give the same impression to an observer. In the sense that both showcases are formed from the same general elements, namely, a top, two side walls, upwardly and rearwardly inclined glass doors, a lower front panel and shelves inside visible through the glass, this is true.

For that matter, many of the prior art patents cited by defendants also disclose the same general combination of these same old showcase elements.

Plaintiffs’ position is not based on any contention that a new combination of elements has been assembled but rather that they have invented a new design by arranging and shaping an old combination of elements so as to give a new and highly pleasing appearance to the visual sense. For this invention, design patent No. Des. 168,288 was issued to plaintiffs.

The test of validity is not whether the combination of mechanical elements is old, but rather it lies in whether the particular way in which the elements are formed,

grouped and assembled is inventive. In this regard, the Court in *Sel-O-Rak Corp. v. Henry Hanger & Display Fixture Corp. of America*, 232 F.2d 176, 178 (CA-5, 1956), said:

“In our consideration of the basic question as to the validity of the patent, we start with the knowledge that every design must of necessity embody something old and known. *Design being only a rearrangement of line and form, it must always depend upon elements that in a strict sense are old.* We are not impressed therefore, with appellees’ attack on the design patent here on the ground that it combined known components. The straight line, the square, the circle, the cube, triangle and sphere are all known components. They are all old. But any design patent, it seems to us, must, of necessity, combine some of these elements. . . .” (Emphasis added.)

Plaintiffs contend that merely because their showcase and the Royal showcase both have slanted fronts, plaintiffs have not invented anything. Instead, plaintiffs submit that their showcase is uniquely different and is an inventive departure from the Royal showcase. Defendants have argued that the two are substantially the same and that the difference between the vertical lower front panel of the Royal case and the rearwardly and downwardly inclined lower front panel of plaintiffs’ case be disregarded. Of course, it is understandable that defendants want to overlook this distinction since they want to advance the view that the two are the same. Parenthetically, if defendants thought there was no difference, why were such pains taken to have their showcase constructed precisely like the patent drawings rather than use a Royal case?

Defendants, in attempting to gloss over the differences, overlook the vital changes and artistic invention that can result from apparently minor physical changes in lines or rearrangements of physical elements. A perfect example is the human face. Mechanically speaking, a face is only two eyes, two ears, a nose and a mouth set on a head covered with skin and hair, and all create the same general visual impression. However, there are astonishing variations in specific visual effect created by differences in proportions and lines of these individual elements. Following defendants' view, one face conveys to an observer the same impression as does any other face. This is, of course, refuted by the ease in which we can distinguish different people by their features, or in which we can distinguish different emotions of a single person by his varying facial expressions.

Plaintiffs do not say that their showcase is the definitive conception of a perfect showcase or that it is impossible to even invent another case. Plaintiffs do contend, however, that their design does involve invention, and specifically is a definite and inventive departure from the prior art as exemplified by the Royal showcase.

The most obvious physical distinction between plaintiffs' and the Royal showcases is fully apparent from the pictures thereof opposite to page 26. In the Royal showcase the glass doors slope down to the front. From there, the imperforate lower front panel extends vertically straight down to the floor. As a customer approaches the Royal case, this lower front panel is in prominent view and is the part of the case closest to the customer.

In plaintiffs' case, the lower front panel also extends downwardly from the bottom of the sloping glass doors, but instead slopes backwardly, away from the customer. In attempting to analyze the effect of this specific feature, Mr. Patriarca testified as follows:

“A. Well, it has quite a few advantages. The first, it improves the symmetry, the balance, and does subdue the woodwork and bring out the display of merchandise.” (R. 86.)

The effects of the two showcases are much better visualized when we consider the appearances of the two cases to a customer, as seen from the height of the customer's eyes. When viewed from above the level of the glass doors, plaintiffs' rearwardly sloping lower front wall tends to disappear. This leaves the contents of the case suspended out towards the customer, offering themselves to him. In the Royal case, the vertical lower front wall remains in view to the customer, imposing itself on the customer's consciousness and diverting his attention from the cigar display in the case. Described in another way, the lower front wall of the Royal cabinet sets up a barrier to sales, while plaintiffs' wall invites the customer to buy. This difference helps cause plaintiffs' case to be the effective one when the sales abilities of the cases are compared.

Of course, viewed after the controversy has arisen, it is easy to try to pick out the details and minimize the effect of each. Consider instead the exuberant reaction of Mr. Glaser to seeing plaintiffs' cabinet for the first time—long prior to this suit:

“I was in the tobacco convention at Atlantic City, and in walking through some of the exhibits I came across this particular cabinet. To me it represented the acme in cigar display and distribution, ability to keep the cigars moving, the cure-all—it was a cure-all for the cigar business, as I saw it, from the standpoint of consumer display and sales. . . .” (R. 96-97.)

As is, of course, apparent from the pictures of plaintiffs’ and the Royal showcases, they are not alike. To cure the deficiency of the prior art Royal showcase, defendants submitted several patents showing downwardly and rearwardly sloping lower front panels. (Defendants’ Exhibits N-S.) Defendants’ expert witness, Mr. Lippincot, was then asked the following question concerning the Royal showcase (Defendants’ Exhibit A):

“Q. (By Mr. Gregg). In view of the state of the art as shown by the patents as to which you have testified, Defendants’ Exhibits N, O, P, Q, R and S, would there be anything unobvious in providing a self-service cigar showcase having the general features shown in Defendants’ Exhibit A and modifying that so as to incline the lower front wall?

A. Not in my opinion. . . .” (R. 178.)

It should be noted that Mr. Lippincot had never been involved in the showcase art prior to this suit, except incidentally in connection with x-ray and radio cabinets when he was associated with the Magnavox Corporation. (R. 169.) Indeed, he testified:

“I not only was never in the retail business where they sold cigars, but I do not even smoke cigars.” (R. 188.)

The obviousness of combining references, as now testified to here, has been commented upon by the courts. In the *Sel-O-Rak* case, *supra*, the Court said at page 179:

“ ‘The defendants may well be regarded as experts in the art, and their conduct was an unbiased and emphatic expression of judgment in favor of the patent; *their present expression and that of their experts are probably entitled to less weight.*’ ” (Emphasis added.)

On the other hand, the unobviousness of plaintiffs' contribution was remarked upon by Mr. Glaser, who has been in the cigar business since 1917 and who was found to be an expert in the field of cigar showcase design by the Trial Court. He testified as follows:

“ . . . When I saw this case I decided that it had everything that was asked for. I had tried to sell—I built cases before. I have gone to special shops and ordered cases for dealers, had them built, I talked to display men and tried to fool around with the cases to see what could be done, but none of the cases answered exactly the problem of this industry, and when I saw this Patriarca case I thought we had hit the jackpot on it.” (R. 98.)

Further excerpts of Mr. Glaser's testimony are as follows:

“No, it is the over-all design, the picture of that case, the look of that case. It is something that has never been produced in this business before. I have never seen it in the cigar business.” (R. 117.)

* * * * *

“ . . . Look, that is what a cigar case used to be. This is what a cigar case is. Look yourself, look at

the over-all picture of this case. This is a creation.”
(R. 119.)

Again, it should be pointed out that the enthusiasm of Mr. Glaser stems from the fact that he makes his livelihood by selling cigars and that plaintiffs’ showcase performs excellently in selling his cigars. His interest is not in the case itself but only in what it does.

The Trial Court says correctly that the test for the validity of a design patent is whether it was beyond the powers of an ordinary designer. The facts that plaintiffs’ showcase is new, that it “represented the acme in cigar display and distribution” to a recognized expert in the field, and that it was slavishly copied by defendants, all point unmistakably to the conclusion that plaintiffs’ design was beyond the powers of an ordinary designer when created.

The whole impression from the evidence is that the Trial Court was clearly mistaken in its conclusion that the design patent is invalid.

6. DEFENDANTS CLEARLY INFRINGE PLAINTIFFS’ PATENT.

No finding was made below as to whether plaintiffs’ design patent was infringed, since the Trial Court erroneously held the patent to be invalid. However, it is submitted that this Court can easily find infringement, since this requires only a comparison of the design patent drawings and the pictures of defendants’ showcase opposite to page 22 of this brief.

The test of infringement is set out in *Gold Seal Importers v. Morris White Fashions*, 124 F.2d 141 (CCA-2, 1941) as follows:

“ . . . The test of infringement is whether the two designs have substantially the same effect upon the eye of an ordinary observer who gives the matter such attention as purchasers usually give. *Gorham Mfg. Co. v. White*, 14 Wall. 511, 81 U.S. 511, 528, 20 L.Ed. 731; *American Fabrics Co. v. Richmond Lace Works*, 2 Cir., 24 F.2d 365, 367. . . .”

Applying the law to the facts of this case, it is obvious that defendants' slavishly copied showcase has substantially the same effect on the eye as does plaintiffs' design and that defendants have taken the heart and essence of the patent for their own.

Defendants clearly infringe plaintiffs' patent rights.

VII

CONCLUSION.

In the present suit, plaintiffs' showcase incorporates the same mechanical features as do other prior art showcases. However, it must be borne in mind that it is the design of plaintiffs' showcase that is patented, not the mechanism dressed in the design. The design of plaintiffs' showcase is unique and is not shown by the prior art.

The evidence at the trial clearly established the commercial success of plaintiffs' showcase in its ability to sell cigars and established that this ability was due principally to the particular design of the case.

The evidence further showed that many competitors copied the patented showcase and then acquiesced in the patent.

Defendants obviously copied the design of the patent, copying plaintiffs' commercial embodiment of the patent to a fraction of an inch.

The testimony of a recognized expert in the field of cigar display showcases clearly indicates that plaintiffs' design is unique and beyond the ability of ordinary designers.

In view of all of these factors, it is apparent that the Trial Court's holding of invalidity of the design patent is clearly erroneous.

Therefore, it is submitted that this Court should reverse the holding below and hold the design patent No. Des. 168,288 to be valid. In addition, this Court should hold that defendants' sale and use of their showcases constitutes an infringement of this design patent.

Dated, San Francisco, California,
November 16, 1959.

Respectfully submitted,

MELLIN, HANSCOM & HURSH,

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

Attorneys for Appellants.

(Appendix Follows.)



Appendix.



Appendix

APPELLANTS' EXHIBITS

Exhibit Number	Identified	Offered	Received	Rejected
1	52	52	52	
2	52	52	52	
3	54	54	54	
4	54	54	54	
5	54	55	55	
6	58-59	59	59	
7	60-61	61	61	
8	62	62	62	
9	63	63	63	
10	64	64	64	
11	68	68	68	
12	70	70	71	
13	71	71	71	
14	71	71	71	
15	92-93	93	93	
16	97	98	98	
17	99-100	100	100	

APPELLEES' EXHIBITS

Exhibit Number	Identified	Offered	Received	Rejected
A	78	154	154	
B	80	126	126	
C	83	126	126	
D	132	131	132	
E	132	131	132	
F	132	131	132	
G	132	131	132	
H	143	145	145	
I	151	153	153	
J	151-152	153	153	
K	153	154	154	
L	153	154	154	
M	153	154	154	
N	173	185	185	
O	173	185	185	
P	173	185	185	
Q	173	185	185	
R	174	185	185	
S	174	185	185	
T	186	186	186	



No. 16,440

IN THE

United States Court of Appeals
For the Ninth Circuit

PATRIARCA MFG., INC., a corporation, DOMENICO
PATRIARCA, an individual, and DONALD A.
CAMERON, an individual,

Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK, and PETER
SOSNICK, a copartnership, doing business as
Melvin Sosnick Co., and MELVIN SOSNICK,
MARVIN SOSNICK and PETER SOSNICK, indi-
viduals, and ALFRED AUSTRUY, an individual,

Appellees.

APPELLANTS' REPLY BRIEF.

MELLIN, HANSCOM & HURSH,

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

391 Sutter Street,

San Francisco 8, California,

Attorneys for Appellants.

FILED

FEB - 3 1960

FRANK H. SCHMIDT,



Subject Index

I.

	Page
Plaintiffs' showcase is not anticipated by the prior art and is beyond the skill of an ordinary designer	2

II.

The commercial success of plaintiffs' showcase in the sale of cigars is highly indicative of invention in the design thereof	5
Conclusion	8

Table of Authorities Cited

	Page
Application of Lange, 228 F.2d 245	6
Jungerson v. Ostley & Barton Co., 335 U.S. 560	6
Pointer v. Six Wheel Corp., 172 F.2d 153	6
Robert W. Brown & Co. v. De Bell, 243 F.2d 200 (1957) ...	2

No. 16,440

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PATRIARCA MFG., INC., a corporation, DOMENICO
PATRIARCA, an individual, and DONALD A.
CAMERON, an individual,

Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK, and PETER
SOSNICK, a copartnership, doing business as
Melvin Sosnick Co., and MELVIN SOSNICK,
MARVIN SOSNICK and PETER SOSNICK, indi-
viduals, and ALFRED AUSTRUY, an individual,

Appellees.

APPELLANTS' REPLY BRIEF.

This brief is in reply to the "Brief for Appellees" filed by defendants and is submitted to refute the erroneous contentions advanced therein.

Defendants' argument is two-fold. First, they claim that plaintiffs' showcase was anticipated by the prior art and was not beyond the skill of an ordinary designer in the art. Secondly, they contend that the commercial success of plaintiffs' showcase will not supply invention when invention is clearly lacking. Neither of these contentions is supported by their argument or by the facts in the case.

I.

PLAINTIFFS' SHOWCASE IS NOT ANTICIPATED BY THE PRIOR ART AND IS BEYOND THE SKILL OF AN ORDINARY DESIGNER.

Defendants begin their argument against this proposition by citing various cases which set forth the general ground rules for design patent cases. There is no quarrel here, since plaintiffs rely upon the most recent Ninth Circuit case, *Robert W. Brown & Co. v. De Bell*, 243 F.2d 200 (1957), as the controlling law on the subject.

Defendants err, however, in their application of the law of the *De Bell* case to the facts in the present controversy.

As has been brought out in our "Brief for Appellants", the most obvious visual distinction between plaintiffs' showcase and the prior art Royal showcase is in the design of the lower front panel of the cabinets. The Royal showcase has a lower front panel extending vertically down to the floor in prominent view of a prospective purchaser, which panel acts to divert his attention away from the contents of the cabinet. Plaintiffs' lower front panel instead slopes downwardly and rearwardly, away from a customer. This design causes this panel to disappear from view when seen from normal eye level with the effect that the contents on display in the cabinet are suspended out towards the customer. The design of the prior art Royal showcase sets up a barrier to sales; plaintiffs' design offers the contents to the customer and invites him to come closer and buy.

Defendants recognize this design difference in their brief wherein at page 5 they refer to this distinction between the Royal and plaintiffs' showcases. They then

go on to say that this particular feature is unimportant, relying on testimony of Mr. Patriarca apparently to that effect.

The portion of Mr. Patriarca's testimony set forth is highly misleading in the context used by defendants. Mr. Patriarca was not describing the difference between the vertical front of the Royal cabinet and the rearwardly sloping front of plaintiffs' cabinet. Instead, he was being asked about the differences between plaintiffs' showcase and a Rubinfeld showcase, both of which had lower front panels disposed rearwardly of the front of the showcase, away from a customer.

Thus, defendants are trying to use Mr. Patriarca's comparison of the lower front panels of plaintiffs' showcase and a Rubinfeld showcase to prove that there is no difference between plaintiffs' showcase and the prior art Royal showcase. However, just because a large orange looks like a small grapefruit doesn't mean that it also looks like a banana.

Instead of thinking that the design of the lower front panel was unimportant, Mr. Patriarca testified exactly to the contrary:

“Well, it has quite a few advantages. The first, it improves the symmetry, the balance, and does subdue the woodwork and bring out the display of merchandise.” (R. 86.)

Obviously, defendants' contention is erroneous.

Defendants' next contention is that the presumption of validity of plaintiffs' patent is destroyed since the prior art now relied upon was not considered by the Examiner

in the Patent Office. Defendants also assert that the Examiner never would have granted a patent on plaintiffs' showcase had he been aware of this "newly discovered" prior art.

This argument is not valid, however, unless this newly discovered prior art is, in fact, more pertinent than that actually considered by the Examiner. If not more pertinent, then the presumption of validity is undisturbed, and in fact, is strengthened.

From the Cameron patent itself, we know that the Examiner in the Patent Office had the Tyler design patent, Des. 111,868, in front of him when he decided to grant plaintiffs' patent. Now, what do the defendants consider to be even better as prior art. According to the following testimony of defendants' expert witness, Mr. Lippincot, the most pertinent prior art device found by defendants was the Rosenberg counter:

"Q. Now you have mentioned a lot of prior art devices, Mr. Lippincot. Which one patent would you say, in your opinion, and including this Exhibit A, this prior use, which one cabinet shown by those would you say most closely resembles what we have been calling this Patriarca cabinet?

A. If we are talking about the Cameron Patent on the Patriarca device, I would think that probably the Rosenberg looks as much like it as any other." (R. 188-189.)

It should be noted that Mr. Lippincot was fully considering the Royal showcase, Exhibit A, when he selected the Rosenberg counter as the most pertinent prior art device of all.

Dec. 2, 1952

D. A. CAMERON
SELF-SERVICE DISPLAY CONTAINER
Filed May 7, 1952

Des. 168,288

Oct. 25, 1938.

J. TYLER
REFRIGERATOR DISPLAY CASE
Filed June 20, 1938

Des. 111,868

(No Model.)

I. ROSENBERG.
DISPLAY ATTACHMENT FOR COUNTERS.

No. 543,657.

Patented July 30, 1895.

FIG.1

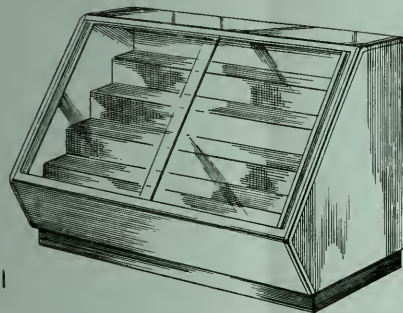


FIG.2

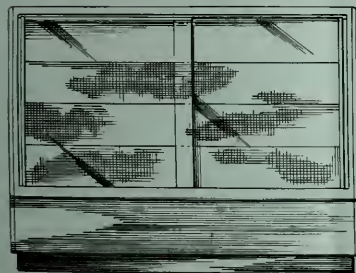
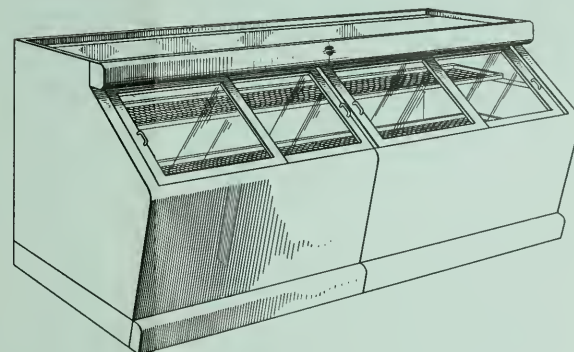


FIG.3



INVENTOR.
Donald A. Cameron
BY *Harmanus Frank*
ATTORNEY



Inventor
Jerry Tyler
BY *Lawrence and Van Antwerp*
Attorneys

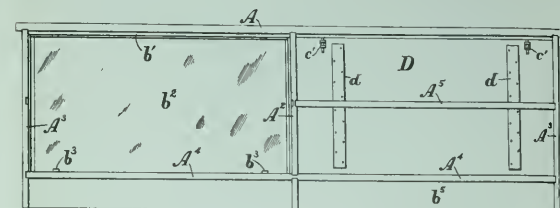


FIG. 1.

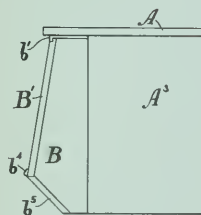


FIG. 2.

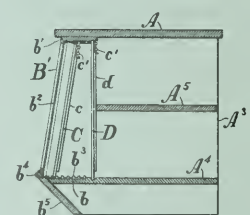


FIG. 3.

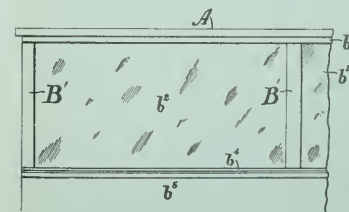


FIG. 4.

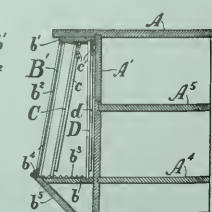


FIG. 5.

WITNESSES.
Howard H. Faltow
Emma Lyford

INVENTOR.
Isaac Rosenberg
BY *Geo. J. ...*

Since a visual inspection is worth a ream of argument, plaintiffs' patent, the Tyler prior art patent and the Rosenberg patent are illustrated on the opposite page. As is readily apparent, the old-fashioned Rosenberg counter is much farther in concept from plaintiffs' invention than is the Tyler patent considered by the Examiner. Therefore, since the most pertinent prior art has been considered by the Patent Office, then the presumption of validity has not been "destroyed".

Defendants conclude this phase of their argument by throwing stones at the Patent Office, saying that plaintiffs' patent is a "disgrace" to the patent system, that it brings discredit to the Constitutional wish of our forefathers and that plaintiffs' showcase is a "gadget" never contemplated by our Constitution or laws as patentable.

This is a great amount of opprobrium to heap upon plaintiffs' showcase which was copied "to the fraction of an inch" (R. 65) for use by the defendants. It certainly does not explain why defendants turned their backs on all of the prior art showcases freely available to them and instead selected plaintiffs' "disgraceful gadget" to sell their merchandise.

II.

THE COMMERCIAL SUCCESS OF PLAINTIFFS' SHOWCASE IN THE SALE OF CIGARS IS HIGHLY INDICATIVE OF INVENTION IN THE DESIGN THEREOF.

It should be noted that defendants have not controverted the main point raised in plaintiffs' brief, namely, that evidence of commercial success is the most important

and reliable objective test of invention of the design of a showcase. The only reason for designing a showcase is to create sales of the merchandise displayed. If there is commercial success in such sales, then the design is effective for its purpose. Instead, defendants rely on *Junger-son v. Ostley & Barton Co.*, 335 U.S. 560; *Pointer v. Six Wheel Corp.*, 172 F.2d 153, and *Application of Lange*, 228 F.2d 245, for the general proposition that commercial success is only to be considered in a close case of invention. However, all three of these cases deal with *mechanical* patents; they are not concerned with *design* patents.

Instead of challenging plaintiffs' position, defendants throw up a smoke screen to hide behind. First, they assert that defendants did not themselves copy and build the accused showcase, but instead that they bought the accused showcase from Rubinfeld Showcase Co. for resale. However, such an argument does not hide the fact that defendants freely chose to use and sell slavish copies of plaintiffs' patented showcase.

Next, defendants challenge the finding by the trial Court that the evidence clearly established commercial success of the showcase of the design patent. (Finding No. 26, R. 44.) Defendants say that this finding is based only on the testimony of Marcus Glaser, and imply that his testimony is not credible. However, the trial Court is the one best able to assess the credibility of the witness, and his finding on this point should not be disturbed unless clearly erroneous. The only real "reason" raised by defendants is that Mr. Glaser is a business competitor of theirs. More than this is necessary to decide now that Mr. Glaser's testimony is not credible. It might also be

pointed out that the trial Court was personally acquainted with Mr. Glaser and has known him for a number of years. (R. 95.) It is highly unlikely that the Court would have been clearly mistaken as to the credibility of Mr. Glaser.

Defendants then make much of their contention that they are being persecuted because plaintiffs brought suit against them to stop their infringement. The purpose of this argument, and its relation to commercial success is not at all clear. Defendants do not contend that the law requires plaintiffs to sue infringers in any specified sequence. Certainly, they cite no case or statute to that effect. Neither do defendants here deny that they have infringed plaintiffs' patent. All that they are doing is trying to disguise their infringement by pointing an accusing finger at Rubinfeld Showcase Co. and by saying that Rubinfeld is an even greater infringer. This is no ground for escaping liability.

Defendants' final contention touches upon the issue of commercial success, and is to the effect that the success of plaintiffs' showcase is due to both its design and to its ability to keep cigars fresh and moist. This argument seems to be that the success is impossible to separate between the two, and, if anything, is due entirely to the use of the humidifier (a mechanical, not a design, feature) in the cabinet.

However, the use of humidifiers in cigar showcases is not new. (Finding No. 18, R. 43.) Therefore, the commercial success of plaintiffs' showcase cannot be due to the use of this old mechanical feature used by others. Moreover, the freshness of the cigars will be apparent

only upon smoking them, and will serve only to create a desire to buy more cigars at a later time. The humidifier does not create any initial desire in a prospective customer, especially since the humidifier is hidden from view. (R. 67.) The evidence further shows that most cigar purchases are made on the spur of the moment. (R. 102.)

Only one thing then can truly account for the proven commercial success of plaintiffs' showcase in creating these point-of-sale purchases. That one thing is the inventive design of the case.

CONCLUSION.

From the above, it is clearly demonstrated that defendants' two major points and the various side issues are without merit.

It is respectfully submitted that this Court should reverse the holding below and hold plaintiffs' design patent No. Des. 168,288 to be valid and infringed by defendants.

Dated, San Francisco, California,

February 1, 1960.

Respectfully submitted,

MELLIN, HANSCOM & HURSH,

OSCAR A. MELLIN,

LEROY HANSCOM,

JACK E. HURSH,

Attorneys for Appellants.

No. 16,440

United States Court of Appeals
For the Ninth Circuit

PATRIARCA MFG., INC., a corporation, DOMENICO
PATRIARCA, an individual, and DONALD A.
CAMERON, an individual,

Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK, and PETER
SOSNICK, a copartnership, doing business as
Melvin Sosnick Co., and MELVIN SOSNICK,
MARVIN SOSNICK and PETER SOSNICK, individ-
uals, and ALFRED AUSTRUY, an individual,

Appellees.

BRIEF FOR APPELLEES.

CONNOLLY & FARBSTAIN,

DONALD F. FARBSTAIN,

785 Market Street,

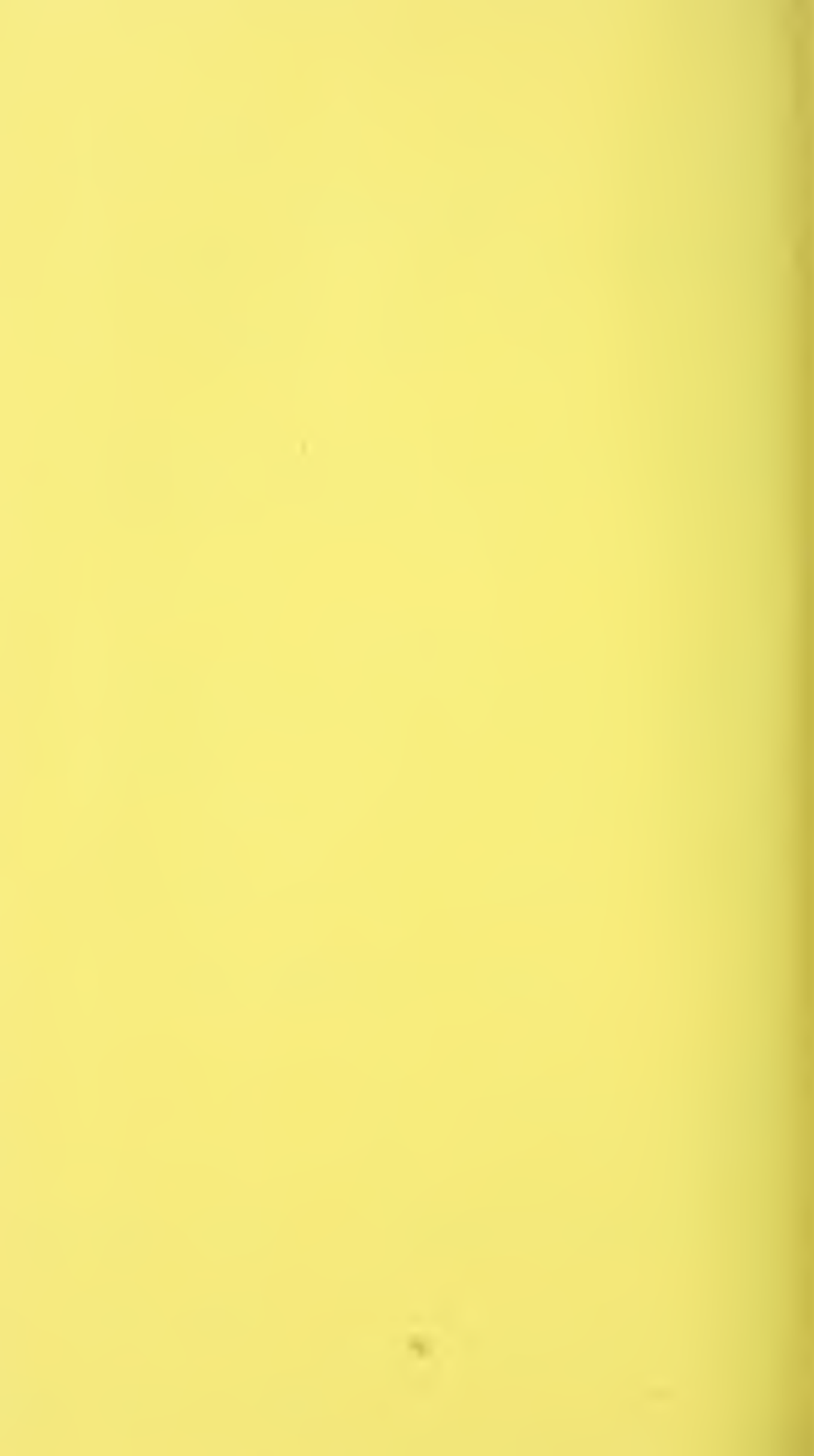
San Francisco 3, California,

Attorneys for Appellees.

FILED

JAN 14 1960

FRANK H. SCHMID, CLERK



Subject Index

	Page
Statement of the case	1
Analysis of plaintiff's argument on appeal	2
Summary of defendants' argument on appeal	2
I. Plaintiff's showcase was anticipated by the prior art and was not beyond the skill of an ordinary designer in the art	3
II. Commercial success or copying of a design, even if shown, will not supply invention where invention is plainly lacking	10
Conclusion	16

Table of Authorities Cited

Cases	Pages
Application of Lange, 228 F. 2d 245	12
Briddell v. Alglobe, 194 F. 2d 416, 92 U.S.P.Q. 100	3
Butcher Boy Refrigeration Door Co. v. Phillips Refrigeration Products Co., 144 Fed. Supp. 331, 110 U.S.P.Q. 517, decided August 14, 1956	4
D & H Electric Co. v. M. Stephens Mfg. Co., Inc., 233 F. 2d 879	8
Great Atlantic and Pacific Tea Co. v. Supermarket Equip- ment Co., 71 S.Ct. 127, 340 U.S. 147	8, 9
Jungersen v. Ostley & Barton Co., 335 U.S. 560	12
Magarian v. Detroit Products Co., 128 F. 2d 544, 53 U.S.P.Q. 659	3
Oriental Foods, Inc. v. Chun King Sales, 113 U.S.P.Q. 407	8
Pointer v. Six Wheel Corp., 172 F. 2d 153	12
Robert W. Brown & Co. v. De Bell, 243 F. 2d 200, 113 U.S.P.Q. 172, C.A. 9, April 5, 1957	3, 6

Codes

35 U.S.C. 171	3
---------------------	---

**United States Court of Appeals
For the Ninth Circuit**

PATRIARCA MFG., INC., a corporation, DOMENICO
PATRIARCA, an individual, and DONALD A.
CAMERON, an individual,

Appellants,

VS.

MELVIN SOSNICK, MARVIN SOSNICK, and PETER
SOSNICK, a copartnership, doing business as
Melvin Sosnick Co., and MELVIN SOSNICK,
MARVIN SOSNICK and PETER SOSNICK, individ-
uals, and ALFRED AUSTRUY, an individual,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

For convenience we will adopt plaintiff's references to the parties. Plaintiff is substantially correct in his apprising this Court of the background of the lawsuit. A few additional facts and emphasis is all that is intended here.

Defendants Sosnick are in the wholesale cigar distributing business. They saw a showcase being used by one of their customers which was manufactured by Rubinfeld Showcase Co. of Los Angeles. It was

one of the now-labeled "accused showcases". Defendants Sosnick thereupon undertook to purchase Rubinfeld showcases for resale to their customers. Some sixteen such showcases were sold, including one to defendant Austruy. Defendants Sosnick also sold the showcase described in Exhibit 2 attached to a stipulation, filed with the Court, which had been manufactured and designed by Rubinfeld.

In the trial below, plaintiff sought to establish the validity of mechanical (utility) patent, U.S. No. 2,735,739, and Cameron Design patent, U.S. No. Des. 168,288.

Plaintiff appeals only from the adverse result as to the Cameron Design Patent.

ANALYSIS OF PLAINTIFF'S ARGUMENT ON APPEAL.

Plaintiff's argument can be briefly summarized as follows:

The plaintiff's showcase is a design beyond the skill of an ordinary designer in the art and was not anticipated in the prior art, and this is proven by the widespread copying of the design and the commercial success of the showcase in selling cigars.

SUMMARY OF DEFENDANTS' ARGUMENT ON APPEAL.

I. Plaintiff's showcase was anticipated by the prior art and was not beyond the skill of an ordinary designer in the art.

II. Commercial success or copying of a design, even if shown, will not supply invention where invention is plainly lacking.

I. PLAINTIFF'S SHOWCASE WAS ANTICIPATED BY THE PRIOR ART AND WAS NOT BEYOND THE SKILL OF AN ORDINARY DESIGNER IN THE ART.

The basic legal rules for Design Patents are well known, and we refer to them briefly.

A design patent is for ornamental appearance, not for utility or function. (35 U.S.C. 171.) However, "a streamlined and pleasing appearance is insufficient, in the absence of invention." *Robert W. Brown & Co. v. De Bell*, 243 F. 2d 200, 202, 113 U.S.P.Q. 172, 173, C.A. 9, April 5, 1957.

It has been repeatedly held that a design patent must involve a high standard of inventive ingenuity. In fact, some Courts have gone so far as to say (*Bridgell v. Alglobe*, 194 F. 2d 416 at 419, 92 U.S.P.Q. 100 at 102):

"To obtain a valid design patent is exceedingly difficult."

In this circuit, it has repeatedly been held that there must be a high standard of invention to sustain a design patent. In *Magarian v. Detroit Products Co.*, 128 F. 2d 544, 53 U.S.P.Q. 659, the Circuit Court of Appeals, Ninth Circuit, said:

"It may readily be conceded, as appellant contends, that the design of the arm is streamlined and pleasing in appearance; but this is insufficient

in the absence of invention. Walker on Patents (Deller's Edition), Vol. 1, §129, p. 421; A. C. Gilbert Co. v. Shemitz, 2 Cir., 45 F. 2d 98, 99 (7 USPQ 115, 116); Berlinger v. Busch Jewelry Co., Inc. 2 Cir., 48 F. 2d 812, 813 (9 USPQ 219, 220). There was no invention here. The outline of the arm is perhaps a refinement over prior structures shown in the record, but that is all that can be said for it."

For a more recent view and one taken by our own Division of the District Court, reference is made to the opinion in *Butcher Boy Refrigeration Door Co. v. Phillips Refrigeration Products Co.*, 144 Fed. Supp. 331, 110 U.S.P.Q. 517, decided August 14, 1956. There, Judge Roche said, in holding a design patent invalid:

"To entitle an applicant to a design patent there must be originality and the exercise of the inventive faculty. Mere mechanical skill, whether of the artisan or of the artists, is insufficient. Associated Plastic Companies v. Gits Molding Corp., (1950) 182 F. 2d 1000, 86 USPQ 226. More is required for a valid design patent than that the design be new and pleasing enough to catch the trade; it must be the product of invention, by which it is meant that conception of the design must demand some exceptional talent beyond the skill of the ordinary designer. Neufeld-Furst & Co. v. Jay Day Frocks, 2 Cir., 112 F. 2d 715, 45 USPQ 632; See also S. Dresner & Son v. Doppelt, 120 F. 2d 50, 49 USPQ 622; Zangerle & Peterson Co. v. Venice Furniture & Novelty Mfg. Co., 133 F. 2d 266, 56 USPQ 351; Hueter v. Compco Corp., 179 F. 2d 416, 84 USPQ 312."

It is apparent from plaintiff's brief, pages 26-31, that plaintiff rests his entire case on the premise that the degree of angle of the vertical lower front panel is the inventive departure from the prior art.

Plaintiff concedes, and it is obvious in any event, that the plaintiff's showcase and the Royal showcase, defendants' Exhibit A, are both formed of the same elements:

a top, two side walls, upwardly and rearwardly inclined glass doors, a lower front panel, and shelves visible through the glass.

The only apparent difference is the fact that the lower front panel of the Royal showcase extends to the floor with a very slight rearward angle as compared to the Patriarca showcase.

However, at the trial, Mr. Patriarca himself said that the feature of his showcase was not important.

He was being asked by his own counsel whether or not the later showcase being sold by defendants with a backward cut front panel, was a substantial or trivial change from the Patriarca showcase. (R. 69-70.)

“Q. After those notices of infringement did the defendants Sosnick commence to sell the cabinet of a different design, that is, somewhat different from the ones that are before us here?

A. That is correct. Oh, sometime after three or four months he did—it came to my attention that he started to sell a little different style of cabinet—exactly the same, actually it is exactly the same cabinet, except he made some change

in the front panel. He just cut backwards instead of slanting downwards.

Mr. Mellin. If the court please, may he produce some models and show what the change consisted of?

The Court. Yes, he may.

The Witness. Actually, instead of bringing the cabinet down this way, he cut it his way and came down.

Q. (By Mr. Mellin.) Is that the only change you could see? (42)

A. To the best of my knowledge that is the only thing.

Q. Can you mark on Exhibit 3 on Figure 3 the change that was made? In other words, cut out that little triangular piece?

A. That is right.

Q. In your opinion was that a substantial or a trivial change?

A. I would say that it's a trivial change. I mean it doesn't do any less or any more than the other does."

There appears to be a serious question in plaintiff's own mind as to the significance of the angle of the lower front panel.

Of utmost significance in this case was the failure of the Patent Office to consider all the prior art, for it is apparent that the "distinctive angularity" of the lower front panel existed in prior art not considered by the Patent Office.

As pointed out in *Brown v. De Bell*, supra at page 202:

“The presumption of *prima facie* validity of a patent is greatly weakened, if not destroyed, when pertinent prior art is not considered by the Patent Office.”

The Patent Office considered prior art consisting of Tyler Des. Patent No. 111, 868 and a Tyler publication, both showing a refrigerator, and design patents to Gochenour, Chase and Pavlock on open stands or showcases. See file wrapper of Cameron patent, Plaintiffs' Exhibit No. 14, wherein it is conceded that:

“Although both Gochenour and Chase show a rearwardly inclined lower front wall, the angle is quite steep, and does not have the very distinctive angularity to the sloping front shown in Fig. 3 of the drawings.”

Particular attention is called to the prior art not considered by the Patent Office which contains the same general configuration as plaintiff's showcase and in particular the “distinctive angularity of the lower front panel.”

Defendants' Exhibit N. Patent, Italy, 459,257, September 1, 1950.

Defendants' Exhibit O. Patent, 2,575,643, Tamsen, November 20, 1951.

Defendants' Exhibit Q. Patent, 1,162,146, Dulgeroff, November 30, 1915.

Defendants' Exhibit R. Patent, 977,318, Bonaffons, November 29, 1910.

Defendants' Exhibit S. Patent, 543,657, Rosenberg, July 30, 1895.

No descriptive claim need be made in a design patent, but as the Court of Appeals said in the case of *D & H Electric Co. v. M. Stephens Mfg. Co., Inc.*, 233 F. 2d 879:

“Claims of a patent must be interpreted with reference to the history contained in the file wrapper, which is nothing more than a written record of the preliminary negotiations between the applicant and the Patent Office for a patent monopoly contract.”

If the Court will compare the Cameron design patent with the Palm Liquors cigar showcase, also called the Royal showcase, Defendants' Exhibit A (shown also in photographs, Defendants' Exhibits K, L and M), striking similarities will be seen. It is incredible that, with the Palm Liquors showcase before him, the Patent Examiner would have allowed the Cameron patent. The Patent Office has been accused of spawning incredible patents (*Oriental Foods, Inc. v. Chun King Sales*, 113 U.S.P.Q. 407; *A & P Case*, 340 U.S. 158), but surely the Patent Office would not have spawned the Cameron patent if the Examiner had known of the Palm Liquors showcase.

The design patent forming the subject of the present suit covers a cigar counter and it is within everyone's knowledge that cigar counters are very old structures. As our Court of Appeals said in the Syracuse case, cited above:

“This court is of the opinion in this case, that one need not explore prior art, that one look at

the bag is enough to convince a court that it lacks the elements that the United States patent laws are intended to protect.”

Thus, even in the absence of *any* prior art, it is believed that it was an abuse of discretion for the Patent Office to issue a design patent on such an article. Wherein lies the invention? Counters have been long known and this one appears to be about like all the others.

Not one of these anticipatory patents was taken into consideration by the Patent Office in granting this patent. Given this art as a starting point, any skilled mechanic could have worked out plaintiff’s design without the exercise of inventive ingenuity. Certainly Design Patent 168,288 is a disgrace to the Patent System and is typical of the patents which have at times brought discredit on what should be a system “To Promote the Progress of Science and Useful Arts.” In the concurring opinion in *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Co.*, 71 S.Ct. 127, 340 U.S. 147, it was said:

“It is not enough that an article is new and useful. The Constitution never sanctioned the patenting of gadgets.”

The patent covers a gadget, well within the skill of one in the art and is clearly not subject matter that our Constitution and Laws contemplated as patentable.

As a final point, the law is clear that utility will not be considered in a design patent. As far as the angu-

larity of the lower front panel is concerned, defendants' expert Donald Lippincott testified (R. 179):

“(The reason for the rearwardly inclined front panel . . .) is to allow the customer to stand near the counter.

Q. Would it be correct to say that the sloping lower front wall of a cigar showcase, such as shown in the Cameron design patent, is primarily a utilitarian feature rather than an ornamental feature?

A. I would think so, yes.”

II. COMMERCIAL SUCCESS OR COPYING OF A DESIGN, EVEN IF SHOWN, WILL NOT SUPPLY INVENTION WHERE INVENTION IS PLAINLY LACKING.

First, one misconception should be dispelled. Plaintiff attempts to infer that defendants designed the accused showcase by slavishly copying the Patriarca case. (P.O.B. 22-26.)

The fallacy of the argument is readily apparent from the uncontroverted testimony of Marvin Sosnick. (R. 162-164.)

“Q. Could you tell us, beginning at the beginning as far as (177) you know it, how the Melvin Sosnick Company got into the business of selling cigar showcases?

A. Well, we had requests from our retailers for such type case or a self-service case, I should say. I was visiting with one of our retailers and he told me that he had purchased two of these cases from Rubinfeld. Presently the cases were

delivered while I was still in the store. I liked the case and offered it to our retailers.

Q. Did you at any time request Mr. Stelling or anyone else connected with the Royal Showcase Company or anybody to copy a Patriarca case?

A. No, sir.

Q. Do you know whether anybody else connected with Melvin Sosnick Company made any such request?

A. I would be the only one who would make such a request.

Q. And you did not?

A. I did not.

Q. At any time did you ask the Rubinfeld Showcase Company to design a particular case for you?

A. Never.

Q. There was a change that was made in the case which you are selling, and that is best shown in Defendants', or rather, Plaintiff's Exhibit 3, where a witness yesterday drew in in pencil a modification change in the cabinet. Did you request Rubinfeld Showcase Company to make that change? (178)

A. No, I didn't. In fact, I was rather surprised when I saw a shipment come in that way.

Q. At the time the Melvin Sosnick Company commenced to engage in the sale of self-service cigar showcases, did you know anything about the patents to Mr. Cameron and Mr. Patriarca, which are in suit in this case?

A. No, I didn't.

Q. Do you know whether anybody else connected with Melvin Sosnick Company knew of these patents at that time?

A. No, they didn't.

Q. Rubinfeld Showcase does not manufacture exclusively for Melvin Sosnick Company, is that correct?

A. That's right.

Q. Do you have any idea about the percentage of the output of Rubinfeld Showcase Company that you sell?

A. Well, I saw Mr. Rubinfeld last October and at that time I believe he said he put out over a thousand cases.

Q. And is your proportion small or large in comparison to that amount of showcases?

A. It is a fraction of a per cent of that.

Q. As far as you know, anyone anywhere can purchase Rubinfeld showcases from Rubinfeld Showcase Company?

A. That's right.

Q. Without going through you?

A. Yes. (179)''

As to commercial success, the authorities are clear:

“Where . . . invention is plainly lacking, commercial success cannot fill the void.”

Jungersen v. Ostley & Barton Co., 335 U.S. 560 at 567.

But commercial success should be considered only where the case is close.

Pointer v. Six Wheel Corp., 172 F. 2d 153 at 156;

Application of Lange, 228 F. 2d 245 at 246.

Plaintiff relies almost exclusively on “commercial success” to support his argument on appeal. And

that "commercial success" is based entirely on the testimony of Marcus Glaser. Mr. Glaser's credibility must therefore be examined.

1. Glaser is a business competitor of defendants. (R. 84, 109, 158, 162.)

2. Glaser is the exclusive representative for plaintiff in California, Oregon, and Washington. (R. 84, 107.)

3. A personal animosity exists between Glaser and defendant Melvin Sosnick. (R. 122.)

Glaser's credibility should also be examined in light of the strong possibility he may be the "real party in interest" in the litigation.

It should be borne in mind that defendants are not manufacturers or designers, but mere distributors of cigars, just as Glaser. It seems strange, then, that they should be singled out for suit, and the manufacturer, Rubinfeld, ignored.

Mr. Melvin Sosnick expressed it (R. 160-161):

"Q. Have you asked the Rubinfeld Showcase Company to give assistance in this lawsuit?

A. I did.

Q. Did they refuse to give assistance?

A. Mr. Rubinfeld told me that he has been in business seven or eight years, that he was in a concentration camp for six years, and that was—he was financially unable to assist me in the expense of this case here.

Q. Then is the financial burden of defending this lawsuit, is that being borne entirely by the Melvin Sosnick Company?

A. Entirely. . . .

A. I believe that I am persecuted, singled out, because we only sell probably one-tenth of one per cent of the cases sold by Rubinfeld. I think, and can't understand why two men would travel three thousand miles to come to San Francisco to sue one individual distributor who is in only one city and vicinity, when he can do it right in his backyard. Now, why it is done that way, I don't know."

Mr. Patriarca's explanation is mystifying (R. 84):

"Q. Could you explain, Mr. Patriarca, since you have come from Providence, Rhode Island, about three thousand miles away, you have come all the way across the country to sue someone on a patent, why is it that you have sued Melvin Sosnick Company, a cigar wholesaler, instead of the manufacturer Rubinfeld Showcase Company? (85)

A. I came about January 15th of last year or thereabout. It (87) might be a few days before or after. I came to San Francisco because I was informed that Sosnick Company was selling cases similar to mine. I came over here and I saw three installations with my own eyes. I was satisfied there was an exact infringement, at least in my own mind. I told my attorney to advise them. They first stalled as long as they could, and then practically told us we didn't have no patent, no leg to stand on, so they are going right ahead and do what they want. At least that is the way I understood it.

Q. (By the Court.) Do you have anything to say about why you have not, if you have not, sued the Rubinfeld Showcase Company?

A. Well, I felt that if we sue one, and if I had to go and sue Rubinfeld, I had to go to Los Angeles, and I don't intend to spend the rest of my days in court. I got a living to make. (88)''

Turning now to the "commercial success" itself. This argument rests solely on the premise that the design is such as to cause customers to buy cigars.

Apparently the design is immaterial in the sale of cases as Mr. Patriarca has only sold 4,000 cases in a market of 2,000,000 retail outlets. (R. 88.)

But the argument of plaintiff is totally unsupported by the evidence.

In discussing the reason for the fact that the cigar business is not an increasing business in today's economy, Glaser cited two things:

"lack of proper display in show cases

and

the lack of proper conditioning for cigars." (R. 101.)

Glaser was unable to pinpoint the reasons for increased cigar sales—stating there were various things to consider such as:

- (1) Influx of population to the West Coast.
 - (2) Greater cigar smoking public in the West.
 - (3) Higher wage scale in the West means more cigar sales.
 - (4) People in fresh air smoke more cigars.
- "This is part of the picture," he said. (R. 111.)

(5) National advertising is also a factor. (R. 110.)

(6) Teaching his customers to merchandise cigars is also a factor. (R. 116.)

“*Fresh*” cigars was the thing most stressed as being the reason for “commercial success”.

As Glaser said at R. 118:

“fresh cigars is the thing that is going to bring cigars back to life.”

Finally, Glaser said (R. 98):

“Q. Do you know whether or not the sale of the cases that you had made have increased or decreased the sale of cigars in your area?

A. I can't say positively that we have increased the sale of cigars in our area through the sale of cigar cases, but I would say our sales have increased perceptibly since 1953.”

CONCLUSION.

Plaintiff's case was carefully considered by the learned trial judge below. The trial Court's decision is well-supported by the record and the law. We ask this Court to affirm that decision.

Dated, San Francisco, California,
January 11, 1960.

CONNOLLY & FARBSTAIN,
DONALD F. FARBSTAIN,
Attorneys for Appellees.

No. 16442 ✓

United States
Court of Appeals
for the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of General
Equipment Co., a Co-partnership Composed of
Wallace D. Loe and John O. Currence and
Wallace D. Loe and John O. Currence, Indi-
vidually, Bankrupts,

Appellant,

vs.

S. H. TANNER,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JUN 17 1959

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Attorneys, Names and Addresses of.....	1
Certificate of Clerk to Record on Appeal.....	49
Concise Statement of Points Urged on Appeal.	51
Exhibit, Trustee's:	
No. 1—Chattel Mortgage.....	42
Hearing on Order to Show Cause.....	20
Witnesses:	
Hutchison, W. D.	
—direct	27
—cross	28
Loe and Currence	
—direct	21
—cross	24
Montgomery, Jack	
—direct	25
—cross	26
Tanner, Benjamin L.	
—direct	29
—cross	32
Weingarten, Saul M.	
—direct	36
—cross	40

INDEX	PAGE
Notice of Appeal.....	19
Order Affirming Ruling of the Referee.....	18
Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens	6
Order to Show Cause.....	4
Petition for Review.....	9
Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens.....	3
Referee's Certificate on Petition for Review...	11

NAMES AND ADDRESSES OF ATTORNEYS

SHAPRO & ROTHSCHILD,
DANIEL ARONSON, JR.,

P. O. Box 508,
Burlingame, Calif.;

JAMES M. CONNERS,

989 Market St.,
San Francisco 3, Calif.,

Attorneys for Appellant.

TWOHIG, WEINGARTEN & HAAS,

Seaside Professional Bldg.,
Seaside, Calif.,

Attorneys for Appellee.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 51656—In Bankruptcy

In the Matter of

GENERAL EQUIPMENT CO., a Co-partnership,
Composed of Wallace D. Loe and John O.
Currence, and WALLACE D. LOE and JOHN
O. CURRENCE, Individually,
Bankrupts.

RECEIVER'S PETITION FOR LEAVE TO
SELL PERSONAL PROPERTY FREE
AND CLEAR OF LIENS

Comes now O. W. Irwin and respectfully represents:

That he is the duly appointed, qualified and acting Receiver of the estates and effects of the bankrupts above named.

That among the assets of said estates which came into the possession of your Petitioner, as such Receiver, are certain tools and equipment as set forth in that certain chattel mortgage in favor of B. H. Tanner, dated August 31, 1957.

That your Petitioner is informed, believes and therefore represents that B. H. Tanner claims an interest in or a lien upon the above-described personal property, the exact nature, extent and/or validity of which said claim is unknown to your

Petitioner, but which said purported claim of lien or interest therein your Petitioner verily believes and therefore represents to be invalid as against your Petitioner, as such Receiver.

That by reason of the premises, your Petitioner represents that it would be to the best interests of said estates if the relief hereinafter prayed were, by this Court, to be granted.

Wherefore, your Petitioner prays for an Order authorizing him to sell the above-described personal property of said estates free and clear of any lien, claim, right or interest therein whatsoever in favor of said B. H. Tanner; or for such other, further or different order or relief as to this Honorable Court may seem just in the premises.

O. W. IRWIN,

Receiver.

By /s/ DANIEL ARONSON, JR.,

One of His Attorneys.

Duly Verified.

[Endorsed]: Filed August 1, 1958, Referee.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon consideration of the annexed duly verified Petition herein filed by O. W. Irwin, Receiver of the estates of the bankrupts above named, and it appearing therefrom that it would be to the best

interests of said estates so to do, and good cause appearing therefor,

Now, on the motion of Messrs. Shapro & Rothschild, attorneys for said Receiver,

It Is Hereby Ordered that B. H. Tanner do personally be and appear before the Hon. Bernard J. Abbott, Referee in Bankruptcy, in Room A, Civic Auditorium, Market and San Carlos Streets, at San Jose, in said District, on the 15th day of August, 1958, at the hour of 2:00 o'clock p.m., then and there to show cause, if any he has, why the relief prayed for in said annexed Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens should not be granted; and

It Is Further Ordered that a true copy of this Order, together with a true copy of said Receiver's Petition, may be served upon said respondent at any time not less than five (5) days prior to the aforesaid hearing hereof.

Dated at San Jose, in said District, this 1st day of August, 1958.

/s/ BERNARD J. ABBOTT,
Referee in Bankruptcy.

[Endorsed]: Filed August 1, 1958, Referee.

[Title of District Court and Cause.]

ORDER DENYING RECEIVER'S PETITION
FOR LEAVE TO SELL PERSONAL PROP-
ERTY FREE AND CLEAR OF LIENS

The duly verified Petition for Leave to Sell Personal Property Free and clear of Liens heretofore filed herein by O. W. Irwin, Receiver of the estates of the above-named bankrupts, together with the Order to Show Cause thereon issued herein on the 1st day of August, 1958, having regularly come on for hearing before the above-entitled Court on the 15th day of August, 1958, and on the 22nd day of August, 1958, said Receiver being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., and Daniel Aronson, Jr., Esq.) appearing, his attorneys, and respondent, B. H. Tanner, being personally present and represented by Messrs. Twohig, Weingarten & Haas (Myron B. Haas, Esq., appearing), his attorneys, and evidence both oral and documentary having been adduced by the respective parties upon the issues involved and the matter having been duly argued and submitted to the Court for decision, and the Court being fully advised in the premises, Finds:

1. That said Respondent at the time of the commencement of the above-entitled proceedings was the owner and holder of a chattel mortgage upon the personal property of said bankrupts more particularly described in said chattel mortgage, which said chattel mortgage was dated the 31st day of

August, 1957, and recorded the 16th day of September, 1957, in the office of the County Recorder of Monterey County, and which said Chattel Mortgage bears the notarial acknowledgment of Saul M. Weingarten as Notary Public in and for Monterey County, dated the 31st day of August, 1957.

2. That it appeared from the testimony of the said Respondent and of said bankrupts that said chattel mortgage was not signed by the mortgagors in the presence of the said Notary Public but was signed in the place of business of said bankrupts, delivered by said bankrupts to said Respondent mortgagee and by him delivered to the said Weingarten on the 13th day of September, 1957, and according to the testimony of said Notary Public was thereafter and on said last mentioned date acknowledged by said mortgagors.

3. That the consideration for said chattel mortgage was not delivered to said mortgagee by said Saul M. Weingarten until the said 13th day of September, 1957.

Wherefrom, the Court Concludes:

1. That there was no unreasonable delay in the recordation of the said chattel mortgage given by said bankrupts as buyers of General Equipment Company to Respondent B. H. Tanner as seller thereof.

2. That solely by reason of the testimony of Saul M. Weingarten, Notary Public, as to the

acknowledgment of said chattel mortgage, said chattel mortgage was properly executed, acknowledged and recorded and is a valid and existing lien upon the personal property as against the estates of the above-named bankrupts (it is here noted that the testimony of said Notary Public on the subject of the alleged acknowledgment of said chattel mortgage was admitted by the Court over the objection thereto of counsel for said Receiver, which objection was made upon the grounds that said testimony would be incompetent, irrelevant and immaterial and that the questions which elicited such testimony from said Notary Public tended to impeach the testimony theretofore adduced by Respondent and accepted by the Court as to the lack of acknowledgment of said chattel mortgage by the mortgagors therein named), and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that said Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens be, and it is hereby denied.

Dated at San Jose, in said District, this 3rd day of November, 1958.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed November 3, 1958, Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Comes now O. W. Irwin, the duly appointed, qualified and acting Trustee of the estates of the bankrupts above named and respectfully represents:

1. That your Petitioner is a party aggrieved by the order denying Receiver's Petition for Leave to sell Personal Property free and clear of liens heretofore made and entered herein by Honorable Bernard J. Abrott, Referee in Bankruptcy of the above-entitled Court on the 3rd day of November, 1958, a full, true and correct copy of which said Order Denying Receiver's Petition for Leave to sell Personal Property free and clear of liens is annexed hereto marked Exhibit "A" specifically referred to and made a part hereof.

2. That the aforesaid Order denying Receiver's Petition for Leave to Sell Personal Property free and clear of liens dated the 3rd day of November, 1958, is erroneous in each and all of the following particulars, viz:

(a) That the finding of fact contained therein and numbered 2 is contrary to the competent evidence adduced upon the trial of the issues joined between your Petitioner and Respondent B. H. Tanner by your Petitioner's Petition for Leave to Sell Personal Property free and clear of liens.

(b) That the aforesaid finding of fact is not supported by the competent evidence adduced upon

the trial of the aforesaid issues more particularly referred to in Order denying Receiver's Petition for Leave to Sell Personal Property free and clear of liens.

(c) That the conclusion of law made by said Referee in Bankruptcy and numbered 2 thereof is contrary to law in that it is not supported by competent evidence adduced upon the trial of said issues more particularly referred to in said Order denying Receiver's Petition for Leave to Sell Personal Property free and clear of liens.

(d) That it affirmatively appears from all of the evidence adduced upon the trial of said issues that the chattel mortgage was not acknowledged according to law.

(e) That it affirmatively appears from all of the evidence adduced upon the trial of said issues and from said Order denying Receiver's Petition for Leave to Sell Personal Property free and clear of liens that said Referee in Bankruptcy based his Order solely upon the testimony of the Notary Public as to the acknowledgment of said chattel mortgage, and which testimony was admitted over the proper objection of your Petitioner.

Wherefore, your Petitioner prays that the aforesaid Order denying Receiver's Petition for Leave to Sell Personal Property free and clear of liens heretofore made and entered herein by said Referee in Bankruptcy on the 3rd day of November, 1958, be reviewed by a Judge of the above-entitled Court

in accordance with the provisions of Section 39 (c) of the Bankruptcy Act, and that said Order denying Receiver's Petition for Leave to Sell personal property free and clear of liens be, by said Judge, reversed with instructions to said Referee in Bankruptcy to make and enter herein such Order in favor of your Petitioner, as such Trustee, of the estates of the above-named bankrupts, upon his said Petition for leave to sell personal property free and clear of liens, as said Judge may, upon such review, determine to be meet and proper in the premises, and for such other, further and additional order as to the Court may seem proper in the premises.

O. W. IRWIN,
Trustee;

By /s/ DANIEL ARONSON, JR.,
One of His Attorneys.

Duly Verified.

[Endorsed]: Filed November 7, 1958, Referee.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER DENYING RE-
CEIVER'S PETITION FOR LEAVE TO
SELL PERSONAL PROPERTY FREE AND
CLEAR OF LIENS

The undersigned, one of the Referees in Bankruptcy, in accordance with the provisions of Section

39 a (8) of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings

That on the 25th day of June, 1958, a voluntary petition in bankruptcy was filed with the above-entitled Court by General Equipment Co., a co-partnership composed of Wallace D. Loe and John O. Currence, and Wallace D. Loe and John O. Currence, individually, and that thereafter said General Equipment Co., a co-partnership composed of Wallace D. Loe and John O. Currence, and Wallace D. Loe and John O. Currence, individually, were duly adjudged bankrupt, and the matter was referred to the undersigned Referee to take such further proceedings as might be required under the provisions of the Bankruptcy Act.

That thereafter, and on the 30th day of June, 1958, O. W. Irwin of the City of Monterey, State of California, District aforesaid, was appointed Receiver of the estates of said bankrupts, and thereafter duly qualified as such Receiver.

That thereafter, and on the first day of August, 1958, O. W. Irwin, as such Receiver, filed with the above-entitled Court his Petition for Leave to Sell Personal Property Free and Clear of Liens, and on the same day, the undersigned Referee in Bankruptcy issued an Order to Show Cause on said Petition, which Order to Show Cause fixed the 15th

day of August, 1958, as the date for the hearing of said Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens (the original of which Petition for Leave to Sell Personal Property Free and Clear of Liens and Order to Show Cause are forwarded herewith as part of this Certificate).

That thereafter, and on the 15th day of August, 1958, O. W. Irwin of the City of Monterey, State of California, District aforesaid, was appointed Trustee, of the estates of said bankrupts, and thereafter duly qualified as such Trustee, and thereafter in all matters succeeded in the place and stead of said Receiver.

That after hearing the evidence and considering the authorities, the undersigned Referee received a proposed form of Referee's Findings and Order from counsel for the Respondent B. H. Tanner (the original of which Findings and Order is forwarded herewith as part of this Certificate); and that thereafter the undersigned Referee received a proposed Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens, and which Order the undersigned Referee signed on the 3rd day of November, 1958, and filed in these proceedings (the original of which Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens is forwarded herewith as part of this Certificate.

II.

Statement of Facts

The facts as developed on the hearings of said matter and as set forth in the Reporter's Transcript of said hearings (the original of which Reporter's Transcript is forwarded herewith as part of this Certificate), are:

In August, 1957, Respondent, B. H. Tanner, entered into an agreement to sell the business known as General Equipment Co., to a partnership which was the predecessor of this bankrupt, and which Agreement was reduced to writing and is dated the 27th day of August, 1957, and which Agreement is Respondent's Exhibit No. 1 in evidence (the original of which Exhibit No. 1 is forwarded herewith as part of this Certificate). That thereafter said business was sold by Tanner to the bankrupt and a chattel mortgage dated the 31st day of August, 1957, was given by the bankrupt to Tanner covering the personal property which is the subject of this litigation, and which mortgage is Trustee's Exhibit No. 1 in evidence (the original of which Exhibit No. 1 is forwarded herewith as part of this Certificate). The \$5,000 payment called for in the chattel mortgage was delivered to Tanner by check on the 13th day of September, 1957, which check is Respondent's Exhibit No. 2 in evidence (the original of which Exhibit No. 2 is forwarded herewith as part of this Certificate), and said chattel mortgage was thereafter and on September 16, 1957,

duly recorded by said Respondent. The bankrupts, Loe and Currence testified that the mortgage was signed on the date that it bears and in the office of the attorneys for Respondent, Tanner; the witnesses of Respondent, Hutchison, and Montgomery, who were part of the partnership who bought the business and executed the chattel mortgage, testified that the mortgage was signed by all four partners at the place of business, and Respondent, Tanner, also so testified; and said Respondent's witnesses further testified that Tanner then took the mortgage to the office of his attorneys, where Saul M. Weingarten then placed upon said mortgage his notarial acknowledgment and delivered to Tanner the \$5,000 check.

The notary, Weingarten, testified that although the mortgage bears the date of the 31st day of August, 1957, he executed his notarial acknowledgment on September 13, 1957, when said mortgage was brought to his office by Respondent, Tanner, and he further testified that the mortgagors acknowledged their signatures at that time.

III.

Hearings

At the times and places fixed for the hearing of said Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens, there appeared before the undersigned Arthur P. Shapro, Esq., and Daniel Aronson, Jr., Esq., of Shapro & Roths-

child, San Francisco, California, for the Trustee, and Myron B. Haas, Esq., of Twohig, Weingarten & Schmidt, of Seaside, California, for the Respondent; said matter was heard and considered by the undersigned upon the records and pleadings as hereinabove set forth.

IV.

Referee's Findings

1. That said Respondent at the time of the commencement of the above-entitled proceedings was the owner and holder of a chattel mortgage upon the personal property of said bankrupts more particularly described in said chattel mortgage, which said chattel mortgage was dated the 31st day of August, 1957, and recorded the 16th day of September, 1957, in the office of the County Recorder of Monterey County, and which said chattel mortgage bears the notarial acknowledgment of Saul M. Weingarten as Notary Public in and for Monterey County, dated the 31st day of August, 1957.

2. That it appeared from the testimony of the said Respondent and of said bankrupts that said chattel mortgage was not signed by the mortgagors in the presence of the said Notary Public, but was signed in the place of business of said bankrupts, delivered by said bankrupts to said Respondent mortgagee and by him delivered to the said Weingarten on the 13th day of September, 1957, and according to the testimony of said Notary Public was

thereafter and on said last mentioned date acknowledged by said mortgagors.

3. That the consideration for said chattel mortgage was not delivered to said mortgagee by said Saul M. Weingarten until the said 13th day of September, 1957.

V.

Statement of Question Presented

The question involved between the parties, which question by his order of November 3, 1958, the undersigned Referee answered in the negative is:

“Is the chattel mortgage here in question invalid by reason of the alleged failure of the Notary Public to properly acknowledge said document?”

VI.

Petition for Review

On the 7th day of November, 1958, and within the time allowed by law therefor, said Trustee, O. W. Irwin, filed his Petition for Review (which original Petition for Review is forwarded herewith as part of this Certificate), of the undersigned Referee's Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens.

VII.

Original Documents

1. Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens and Order to Show Cause thereon.

2. Reporter's Transcript of Testimony.
3. Referee's Findings and Order.
4. Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens.
5. Respondent's Exhibit No. 1—Agreement.
6. Trustee's Exhibit No. 1—Chattel Mortgage.
7. Respondent's Exhibit No. 2—Check.
8. Respondent's letter memorandum of September 2, 1958.
9. Trustee's letter memorandum of September 11, 1958.
10. Petition for Review.

Dated at Oakland, California, in said District, this 8th day of December, 1958.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed December 12, 1958, U.S.D.C.

[Title of District Court and Cause.]

ORDER

The Trustee in Bankruptcy has applied for review of the Referee's order denying Receiver's petition for leave to sell personal property free and clear of liens. This motion has been argued and

submitted on briefs. It is the finding of this Court that the chattel mortgage here in question is valid and constitutes a proper lien on the property.

Accordingly, It Is Ordered, that the petition of the Trustee is denied and the ruling of the Referee in Bankruptcy be, and hereby is affirmed.

Dated: March 10, 1959.

/s/ LLOYD H. BURKE,
United States District Judge.

[Endorsed]: Filed March 10, 1959, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that O. W. Irwin, the duly appointed, qualified and acting Trustee of the estate of the above-named bankrupts, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order of Honorable Lloyd H. Burke, Judge of the above-entitled Court, signed and filed herein on the 10th day of March, 1959, affirming the Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens, made by Honorable Bernard J. Abrott, one of the Referees in Bankruptcy of the above-entitled Court on the 3rd day of November, 1958, and from the whole thereof.

Dated at Burlingame, California, in said District,
this 30th day of March, 1959.

SHAPRO & ROTHCHILD, and
JAMES M. CONNERS,

By /s/ DANIEL ARONSON, JR.,
Attorneys for O. W. Irwin, Trustee of the Estate of
the Bankrupts Above Named.

[Endorsed]: Filed March 31, 1959, U.S.D.C.

In the United States District Court, for the North-
ern District of California, Southern Divi-
sion

No. 51656—In Bankruptcy

In the Matter of

GENERAL EQUIPMENT COMPANY,

Bankrupt.

HEARING ON ORDER TO SHOW CAUSE

First Meeting of Creditors

Held Before Hon. Mernard J. Abrott, in Room A,
Civic Auditorium, San Jose, California, on
August 15, 1958.

Following the election of a Trustee, Mr. Loe and
Mr. Currence were sworn as witnesses for the
Trustee, and testified.

MR. LOE AND MR. CURRENCE

Direct Examination

By Mr. Shapro:

Q. You bought this business, gentlemen, when?

Mr. Currence: September 1, 1957.

Q. What was the total purchase price?

A. \$31,000.00 some odd dollars.

Q. How much did you pay down, approximately?

A. \$5,000.00.

Q. How was that contributed—by the two of you equally?

A. No—there were four of us; it was \$1,250.00 each.

The Court: Mr. Loe, you answer the questions, unless you need help from Mr. Currence, so the reporter will know who is speaking.

Q. (By Mr. Shapro): Mr. Loe, the original General Equipment Company was composed of yourself, Mr. Currence, Mr. Hutchison and Mr. Montgomery?

A. Right.

Q. When did Hutchison and Montgomery withdraw? [1*]

A. February, 1958.

Q. Were they paid anything, or did they withdraw any assets at the time they withdrew from the company?

A. Hutchison was given \$900.00 cash and Jack Montgomery \$500.00, with a personal note from each of us for the balance between that and whatever they drew and what John——

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Mr. Loe and Mr. Currence.)

Q. What they owed on their personal note, around \$600.00?

A. A personal note for about \$600.00 for each one of them.

Mr. Shapro: I have no further questions on general examination.

The Court: Are there any other creditors in court who desire to ask other questions of either Mr. Loe or Mr. Currence, of General Equipment Company? This has nothing to do with the Order to Show Cause?

Mr. Shapro: No.

Mr. Haas: This is based on the ground that the chattel mortgage given by the original four partners to Mr. Tanner, as I understood when I spoke to Mr. Aronson—my understanding was that it was not recorded at the time the mortgage bears, I propose to show, first—

Mr. Shapro: Please, Counsel, in view of the fact that your witnesses are here, I prefer that you do not make a statement of what you propose to show, because there is such a thing as leading the witness.

The Court: The Trustee waives any defect by reason of the respondent not filing an answer for the partnership? [2]

Mr. Shapro: Oh yes, we are only interested in the facts, your Honor. Since the burden is mine to show that the mortgage is not good, Mr. Haas, perhaps we can dispose of that.

Q. Are you familiar, Mr. Loe, with the names of the four gentlemen who bought the business?

(Testimony of Mr. Loe and Mr. Currence.)

A. I am.

Q. There are enumerated in the mortgage some motor vehicles—a Dodge, Studebaker, and so forth?

A. Yes.

Q. Were the pink slips to those motor vehicles endorsed over to Mr. Tanner at that time?

A. I don't know; I never saw the pink slips.

Q. (By Mr. Shapro): Would you answer the question the same way, Mr. Currence?

A. Yes, sir, I never saw them.

Q. The mortgage in question is dated August 31; I show you a photostatic copy of it; it bears the notarial acknowledgment before Mr. Weingarten, as the 31st of August, 1957. Did you personally—confining it to you, Mr. Loe—did you sign that mortgage in Mr. Haas' office or Mr. Weingarten's office on the 31st of August?

A. In Mr. Weingarten's office.

Q. On that date?

A. It was on that date.

Q. And Mr. Currence?

A. Yes, I think you will find that all four of us went in there at the same time.

Q. It was not on August 31st?

A. I believe it was.

Q. And was the mortgage left there at that time?

A. Yes.

Q. In Weingarten's office?

A. Yes; we didn't get a copy of the chattel mortgage for over a month.

(Testimony of Mr. Loe and Mr. Currence.)

Mr. Shapro: I have no further questions of these gentlemen at [3] this time.

Cross-Examination

By Mr. Haas:

Q. Did you sign any other documents in connection with this sale?

A. Loe signed a partnership agreement.

Q. Didn't you sign a purchase agreement? I have a copy of it here.

A. Well, then, I must have signed it, if you have it there.

Q. Were there any of these documents that were not signed in Mr. Weingarten's office?

A. What documents not signed; what documents are you speaking of?

Q. You stated you signed a partnership agreement? A. Yes.

Q. And a chattel mortgage and an agreement to purchase the business? A. Right.

Q. Do you know where each of those were signed? A. Yes.

Q. Where?

A. At Mr. Weingarten's office.

Q. All at one time?

A. With four of us present; Montgomery, Hutchison, Currence and myself.

Q. I show you a photostat, Mr. Loe, with the original agreement signatures, and ask if that bears your signature? A. Yes, it does.

(Testimony of Mr. Loe and Mr. Currence.)

Q. Did you see the date on that agreement above your signatures?

A. 27th of August—I said to the best of my knowledge.

The Court: That is all right, don't worry about that. Mr. Shapro, do you have other witnesses?

Mr. Shapro: No; I am going to call the Respondent as an [4] adverse witness.

Mr. Haas: I have some other witnesses to be sworn.

The Court: Now, Mr. Haas, who are your other witnesses?

Mr. Haas: I would like Mr. Tanner, Mr. Montgomery, and Mr. Hutchison, all to be sworn.

The Court: Who first?

Mr. Haas: I will call Mr. Montgomery.

JACK MONTGOMERY

produced as a witness on behalf of the Respondent, was sworn by the Court, and testified as follows:

Direct Examination

The Court: What is your first name?

A. Jack.

The Court: You may proceed, Mr. Haas.

By Mr. Haas:

Q. Mr. Montgomery, you are one of the partners in General Equipment that purchased the business from Mr. Tanner?

A. That's right.

(Testimony of Jack Montgomery.)

Q. In the purchase of that business do you recall the negotiations involved? A. I do.

Q. Do you recall what documents were executed?

A. Remembering back, we signed the agreement in Weingarten's office before September first, and the chattel mortgage was signed in the place of business—I couldn't tell you the exact date but it would be 10 or 12 days afterwards.

Q. After what?

A. After we took possession.

Q. Of the business? A. That is correct.

Q. Do you recall why this delay occurred? [5]

A. The figures weren't up to date, and the book-keeper who was taking care of the books for both ourselves and Mr. Tanner was on vacation, and we waited for him to finish up the mortgage and the figures.

Q. How did the chattel mortgage get to the place of business; do you recall who brought it there?

A. I believe Mr. Tanner brought it down at that time.

Q. Who signed it there, do you recall?

A. All four of us signed it there.

Cross-Examination

By Mr. Shapro:

Q. Mr. Montgomery, what time of the day was this mortgage signed?

A. That I couldn't tell you.

(Testimony of Jack Montgomery.)

Q. Was Mr. Weingarten at the place of business? A. Not to my knowledge.

Mr. Shapro: No further questions.

The Court: And the next gentlemen you want?

Mr. Haas: Mr. Hutchison.

W. D. HUTCHISON

produced as a witness on behalf of the Respondent, was sworn by the Court, and testified as follows:

The Court: What is your first name?

A. W. D., initials only.

Direct Examination

By Mr. Haas:

Q. Mr. Hutchison, you are one of the partners that took over this General Equipment Company last year from Mr. Tanner? A. Yes. [6]

Q. Do you recall the situation that led up to the execution of the document in connection with the purchase of the business? A. Yes.

Q. Will you explain it to the Court in your own words?

A. We met Mr. Weingarten at his office about the first of September and he drew up the agreement between the four of us. As I recall it was several days later that the inventory was brought down and the contract with Tanner was signed several days later—I don't know exactly.

Q. This document that was brought down; where was it brought?

(Testimony of W.D. Hutchison.)

A. To the office of General Equipment.

Q. How long had you been in business there at that time? A. Approximately 12 days—14.

Q. What day did you take over the business?

A. First day of September.

Q. Who brought the mortgage down there for you to sign?

A. I am not sure; either Mr. Tanner brought it or I went up to his office and brought it to General Equipment.

Q. Did you sign it at that time? A. Yes.

Q. In the presence of any other persons?

A. Yes, I believe all four of us.

Q. Did you all sign? A. Yes.

Q. What happened to the chattel mortgage then?

A. It was sent back to Weingarten's office, I believe.

Q. Do you know who took it to Weingarten's office?

A. I think possibly I did, or Mr. Tanner. [7]

Cross-Examination

By Mr. Shapro:

Q. Mr. Hutchison, was Mr. Weingarten present when the four of you signed this chattel mortgage at the office of General Equipment Company?

A. Yes, sir, I believe he was.

Mr. Shapro: That is all.

BENJAMIN L. TANNER

produced as a witness on behalf of the Respondent, was sworn by the Court, and testified as follows:

The Court: What is your full name?

A. Benjamin L. Tanner.

Direct Examination

By Mr. Haas:

Q. Mr. Tanner, you were the seller at the General Equipment Company last year? A. Yes.

Q. And you sold to Mr. Loe, Mr. Currence, Mr. Hutchison, and Mr. Montgomery? A. Yes.

Q. Do you know what documents were executed in the sale of that business?

A. There was an agreement of sale and chattel mortgage and the note secured by the chattel mortgage—that I know.

Q. When were all of these documents—do you recall when these documents were executed?

A. Well, the agreement of sale was signed before the first of September in Mr. Weingarten's office; the chattel mortgage was not signed until the 12th or 13th of September by myself and all the partners—by all the partners. There was a condition of the payment—of the down-payment—that the chattel [8] mortgage be delivered to Mr. Weingarten before I could be paid the \$5,000.00 down-payment; I remember very distinctly I was trying to get the signatures and get the amount fixed in the note that was to be secured by the chattel mortgage.

(Testimony of Benjamin L. Tanner.)

Q. Was there any reason for this delay of execution?

A. Yes, we had to verify certain accounts receivable and certain other items to be included in the amount of the note which was the price of the business less \$5,000.00, and we hadn't computed all those things. The bookkeeper who was working on them wasn't able, and it took us that long to get the final determination.

Q. Was any financing necessary?

Mr. Shapro: I object to that as suggestive—

The Court: Sustained.

Q. What was the contemplated financing of the business when you signed the agreement?

Mr. Shapro: I submit, if your Honor please, it is an agreement in writing and speaks for itself; that is the best evidence.

The Court: The Court doesn't have it.

Mr. Shapro: There is another copy.

Q. (By Mr. Haas): Referring to paragraph 4, page 2 of that agreement, certain financial matters were mentioned there: Referring to the Veterans Administration guarantees—were those carried through?

A. No, they were unsuccessful in getting those arranged for; [9] that method of financing was abandoned.

Q. Would any delay in execution of the mortgage have reference to the infeasibility of financing?

Mr. Shapro: I object to it as leading and sug-

(Testimony of Benjamin L. Tanner.)

gestive. If Counsel desires to testify, he may be sworn.

The Court: Sustained.

Q. Were there any other reasons for the delay in execution of the mortgage other than working with your accountant?

A. Well, the details of financing had to be worked out—the final agreement on payment, what the down-payment and the balance of the installment payments would be.

Q. You have testified that you did not receive any payment from Mr. Weingarten on this business until you had turned the mortgage over to him: is that right? A. That is correct, yes.

Q. How was the payment made to you?

A. It was a check from Mr. Weingarten for \$5,000.00 which I received on October 13th—on September 13th.

Q. What day of the week was it that you received this?

A. Friday. It was paid when I delivered the mortgage to Mr. Weingarten for recording.

Q. What date did you say that was?

A. September 13th.

Q. Friday?

A. Friday, September 13th. I was told he was going to attend to the recording immediately—

Mr. Shapro: I move to strike the answer as to what he was told. [10]

The Court: So ordered.

(Testimony of Benjamin L. Tanner.)

Q. You say you delivered the chattel mortgage and received a check in return for it?

A. That is correct.

Mr. Haas: I would like to enter into evidence the check——

The Court: First the Court is going to mark the Agreement as Respondent's No. 1.

Mr. Shapro: You are offering this check into evidence, Mr. Haas?

Mr. Haas: Yes.

Mr. Shapro: No objection.

The Court: Respondent's No. 2.

Q. (By Mr. Haas): Mr. Tanner, would you examine that check when the Referee is through with it and tell the Court whether you recognize it?

A. Yes.

Q. What check is it; how do you recognize it?

A. It is a check I received from Mr. Weingarten when I delivered the chattel mortgage.

Q. Does it bear an endorsement by you?

A. Yes.

Q. When was this check given you?

A. September 13th.

Cross-Examination

By Mr. Shapro:

Q. Mr. Tanner, you said in the beginning of your testimony that there was a delay in the signing of the chattel mortgage by the four partners? A. Yes.

(Testimony of Benjamin L. Tanner.)

Q. Will you take a look at this mortgage and tell me where you signed that mortgage, please?

A. I didn't sign the mortgage. [11]

Q. But you testified that was one of the reasons there was a delay—that you had to sign it, too?

A. No, I merely said I thought the four partners and I signed at the time. I was mistaken, I didn't sign it.

Q. You are quite sure you didn't receive this check till the 13th of September?

A. Yes, definitely.

Q. Tell me why the bank endorsement shows the deposit to your account on September 11th?

A. I don't think it was deposited on September 11th.

Q. I ask you to look at the endorsement of the American Trust Company that shows September 11th?

A. I don't see it says September 11th; I think that is September 13th.

Mr. Shapro: All right, we will let the Judge decide.

Mr. Haas: May I see that? (Looking at document.)

Q. (By Mr. Shapro): As I understand, Mr. Tanner, when you took this mortgage in it had been signed by the four partners at their place of business? A. Yes.

Q. Mr. Weingarten was not present when they signed it? A. No.

Q. What date was it that you saw them sign?

(Testimony of Benjamin L. Tanner.)

A. I think it was the 12th or 13th.

Q. 12th or 13th of September? A. Yes.

Mr. Shapro: I have no further questions. I would like to offer in evidence a certified copy of the chattel mortgage.

The Court: Trustee's No. 1.

Mr. Haas: Mr. Shapro, I think if you examine that check [12] you may see that it was deposited on September 13th.

Mr. Shapro: All I can see is—it was paid on the 11th and from the perforation and from the endorsement of the American Trust Company, to my pair of glasses it looks like it is the 11th; it doesn't look like the 13th to me.

The Court: Anything further?

Mr. Haas: I have four Affidavits; one of Mr. Weingarten——

Mr. Shapro: I object to any ex parte affidavits; if any evidence is to be offered I insist that it be here in the form of testimony. and if Mr. Haas desires a continuance for that purpose I will not agree to accept any ex parte affidavits.

The Court: With the objection on the part of the Trustee I have no alternative but to continue it; in other words, he is certainly entitled to an opportunity to examine the four witnesses or affiants; but as far as the Court is concerned it would be without prejudice to your clients' rights; you will be afforded whatever opportunity you desire to furnish any testimony. Anything further, gentlemen?

Mr. Shapro: Nothing further as far as the Trustee is concerned.

Mr. Haas: Nothing further.

The Court: Do you gentlemen desire that the matter be carried until you produce this witness?

Mr. Haas: I was going to produce him to substantiate the testimony of Montgomery and Hutchison. They have already testified; if you want Mr. Weingarten here—— [13]

Mr. Shapro: Do you want him here?

Mr. Haas: I don't think he can be here for some time, and frankly I don't think he can add anything further, other than the fact that he is an attorney and notary and would testify to the same effect.

Mr. Shapro: At the opening you stated that your only objection to the mortgage was delay in recordation. On the basis of the testimony I desire to have it understood it is on the ground that the mortgage was not properly acknowledged as required by statute, anyway. [14]

San Jose, California, August 22, 1958

The Court: Are you ready to proceed, gentlemen?

Mr. Haas: Yes.

SAUL M. WEINGARTEN

produced as a witness on behalf of the Respondent, was sworn by the Court, and testified as follows:

The Court: What is your full name?

A. Saul M. Weingarten.

(Testimony of Saul M. Weingarten.)

The Court: Mr. Weingarten, where do you reside?

A. I reside at 4135 Crest Road and Chamis Way, Pebble Beach.

Q. What is your occupation or business?

A. I am an attorney.

Direct Examination

By Mr. Haas:

Q. Referring to the transfer of business of General Equipment Company to Mr. Hutchison, Mr. Montgomery, Mr. Currence and Loe, the four purchasing parties last year—are you familiar with that transaction?

A. Yes, I acted for them, acted as escrow holder in that [1*] transaction.

Q. Would you recall how the transaction went?

A. Mr. Tanner and the four others spoke of the possible sale and tentative terms of sale were agreed upon, involving the payment of \$5,000.00 down by the purchasers, and each of them to obtain a G. I. guarantee or loan for most of the balance. Subsequent to this the purchasers found they couldn't obtain the guarantee loan, and I drew up another agreement. Mr. Tanner agreed that he would sell to them without the guarantee loan—taking, instead, a chattel mortgage on the equipment which he was selling. The agreement was entered into on the 27th day of August, and on the 31st day of August a

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Saul M. Weingarten.)

chattel mortgage was drawn; at that time the chattel mortgage could not be completed because it was necessary for the parties——

Mr. Aronson: Just a moment, Mr. Weingarten, the day you refer to—you said it could not be completed on the 31st of August?

A. 31st of August, that is correct.

Mr. Aronson: If I may interject, you acknowledged the document which is in evidence—I don't have it; is that correct?

A. That is correct.

Q. And the writing of the date that appears on the first line; is that in your handwriting?

A. It is. The document could not be completed on the 31st day of August; the reason it couldn't be completed is that the parties at that time agreed——

Mr. Aronson: I am going to object to any testimony that the [2] document could not be completed—any testimony that bears on that, your Honor. The document speaks for itself; it was made and executed on the 31st day of August, and any testimony given by Mr. Weingarten would be by way of impeachment of any witnesses called.

The Court: Well, Mr. Aronson, I would prefer that counsel for the respondent ask the question, and then if the question is objectionable you make the objection.

Q. (By Mr. Haas): The document was not signed on the date it bears?

A. No, it was not.

(Testimony of Saul M. Weingarten.)

Q. Can you explain why?

Mr. Aronson: I am going to object to this question and others along this line for the reason stated, and I ask that it be stricken.

The Court: Objection overruled.

Q. (By Mr. Haas): Now, can you explain why?

A. The parties would have to go through all the equipment on their inventory and agree on an amount, which they did between the 31st of August and the 13th of September. During that time I held the \$5,000.00 which had been paid, in escrow. On the 13th of September the document was signed as their signatures appear here. On that same day all four parties named—Mr. Loe, Mr. Currence, Mr. Hutchison and Mr. Montgomery—came to my office for the purpose of—primarily they were entering into a partnership, and I drew the partnership agreement for them. Also, they wanted me to explain to them at that time generally [3] the differences between partnerships, corporations, and various forms of doing business. At that time, on the 13th day of August, I took their acknowledgment as a Notary Public. Now, the date that was written in that appears in my handwritting is an error, and it states the 31st day of August. My only explanation of that is that I believe I must have copied this from the date appearing on the first page of the chattel mortgage. I know that they signed on the 13th of August and that I took the acknowledgment on that date.

The Court: Of August?

(Testimony of Saul M. Weingarten.)

Mr. Weingarten: Of September.

The Court: And when you said the 13th of August before, you meant the 13th of September?

A. Yes.

The Court: And you took the acknowledgment on that date?

A. I took the acknowledgment on that date. Also, on that date I forwarded the instrument to the Monterey County Recorder for recording. I also issued a check on that date to Mr. Tanner in the amount of \$5,000.00 which I was holding as escrow holder.

The Court: Counsel, this is Respondent's No. 2 of last week—not the date you are speaking about.

Q. (By Mr. Haas): Mr. Weingarten, do you recognize that? (Showing the witness a document.)

A. I do; it bears my signature and the amount of \$5,000.00, being the check to which I had reference.

Q. When did you issue that? [4]

A. On the 13th day of September, after taking the acknowledgment and sending this in for recordation. I believe the 13th was Friday, and this was recorded on the next business day, in the office of the County Recorder, on the 16th. It bears time of recording as "8:20 a.m."

The Court: Is that all, Counsel?

Mr. Haas: Yes.

(Testimony of Saul M. Weingarten.)

Cross-Examination

By Mr. Aronson:

Q. Do you keep a register of all documents?

A. I do—a separate register of all things outside the office. Things in the files, I do not; that is my record of it.

Q. You didn't keep a record of this?

A. Not as a Notary; I have it in my own file.

Q. When was the mortgage delivered to the Bankrupts; on the 31st of August or on the 13th of September?

A. Delivered to the Bankrupts? It was on or about the 31st.

Q. Excuse me—delivered to——

A. To Mr. Tanner.

Q. By the Bankrupts?

A. That's right; that was on the 13th.

Q. It is your testimony that it was signed by them when? A. On the 13th.

Q. Who prepared this document?

A. I did. It is my testimony that they actually acknowledged it on the 13th. They, together with Mr. Tanner, had jointly taken the inventory of the equipment during the period elapsing between the 31st of August and the 13th of September.

Q. The description of the items to be covered by the mortgage: [5] When was that put in, Mr. Weingarten? A. May I see it?

(Counsel hands document to the witness.)

Qty.	Description	Serial or Model No.
Trailers:		
1	Metal Rollmaster	
1	All Metal Dump 4x8'	
Trucks (Hand Type) Refrig. Dolleys:		
2	Hand trucks—good @ \$5.50	
1	Hand truck—old	
Tractors & Accessories—Misc. Farm Equip.		
1	Harrow w/bar (wood)	ID1-4365
1	Farmall Cub	109579
1	2-way Plow for cub 189	
1	Leveling Blade for cub 189	
1	Spartan Sprayer—Mod. 33	J-43722
1	Gilson Corporal Garden Tillers @ \$124.00	
	Vacuum Cleaner—Black & Decker	
Trucks Being Sold as of 9/1/57		
1951	Dodge ¾ Ton Express Pickup	
1938	Dodge Flat Rack	
1946	Ford 2 Ton	
1947	Studebaker ¾ Ton Pickup	
1949	Ford Panel	
1951	Chevrolet Van	
Shop Equipment Being Sold as of 9/1/57		
Bench Vises, Coils, Condensers		
Floor Jack		
Chain Hoist		
Power Grinder		
A. C. Welder—1955 Birdshell, 110-220 Model 190		
Hi-Voltage Tester—1957		
Lawn Mower Sharpener “Modern” 1956		
Back-Lapping Machine “Modern” 1957		
Heater—overhead for office bldg. 1957		
Gas Stove		
Store Fixtures		
Office Equipment Being Sold as of 9/1/57		
Cash Register		
Clary Adding Machine		
Typewriter—Underwood		
Desks, Cabinet, Cases, etc.		

as security for the payment to the said mortgagee of Twenty-five Thousand, One Hundred Sixty-two Dollars and thirty-three cents (\$25,162.33) lawful money, of the United States of America, with interest thereon at the rate of six (6) per cent per annum, according to the terms and conditions of that certain promissory note executed and delivered by the mortgagors to the mortgagee, of even date herewith, and in the words and figures following, to wit:

Principal and interest shall be payable in monthly payments of \$400.00 or more each, on the first day of each and every month beginning on October 1, 1957, until April 1, 1958, then thereafter said payments at the rate of \$600.00 per month or more on the first day of each and every month beginning on said April 1, 1958, and extending to October 1, 1958; then at the rate of \$800.00 or more each, on the first day of each and every month beginning on the said October 1, 1958, and continuing until said principal sum has been paid.

It is also agreed that if the mortgagors fail to make any payment as in said promissory note provided, or shall fail to make payment of any other moneys secured hereby, then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount of the debt or debts secured by this mortgage, and all costs of sale, including counsel fees not exceeding Twenty (20)

per cent upon the amount due, paying the surplus to the mortgagors. And for the purpose of taking possession of and selling said property, the mortgagors do hereby appoint the said mortgagee attorney, irrevocable, with full power of substitution and revocation.

This mortgage is also given as security for the repayment of sums that may be advanced, expenditures that may be made, or indebtednesses or obligations that may be incurred subsequent to the execution hereof, up to and including the sum of \$5,000.00.

In Witness Whereof the said mortgagors have executed these presents the day and year first above written.

Signed and Executed in the Presence of:

/s/ WALLACE DAWSON LOE,

/s/ JOHN O. CURRENCE,

/s/ W. D. HUTCHISON,

/s/ JACK B. MONTGOMERY.

Book 1816, Page 358.

State of California,

County of Monterey—ss.

On this 31st day of August in the year of our Lord one thousand, nine hundred and fifty-seven,

before me, Saul M. Weingarten, a Notary Public in and for the said County of Monterey, State of California, residing therein, duly commissioned and sworn, personally appeared Wallace Dawson Loe, John O. Currence, W. D. Hutchison and Jack B. Montgomery, known to me to be the persons described in and whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal at my office in said County of Monterey the day and year in this certificate first above written.

[Seal] /s/ SAUL M. WEINGARTEN,
Notary Public in and for Said County of Monterey,
State of California.

25418. Monterey County Official Records. Recorded at request of Twohig, Weingarten & Schmidt, 1957, Sep. 16, A.M. 8, 28. Book 1816, Page 355. 4. 40

/s/ EMMETT M. MENAMIN,
Recorder.

Received in evidence August 15, 1958.

(Testimony of Saul M. Weingarten.)

A. The initial list, that is, the list of items indicating the description, was put in between the 31st of August and the 13th of September; the amount which is on the second page I have entered as \$21,162.33, was put in on the 13th; they had not arrived at that figure until that time.

Q. When did they sign it?

A. I believe it was on the 13th; I know they acknowledged it on that date.

Q. Where? A. In my office.

Mr. Aronson: I have no further questions.

The Court: Submitted?

Mr. Haas: I would like to call Mr. Tanner for just one question.

Mr. Aronson: Who?

Mr. Haas: Mr. Tanner.

Mr. Aronson: I will object; the matter was called for the sole purpose of having Mr. Weingarten testify.

The Court: What is the basis of submission; do you gentlemen desire to send me a memo or not? From what I know about it I think it is purely a question of fact.

Mr. Haas: I believe on an Order to Show Cause—Mr. Aronson, you and I were here last week—

The Court: Mr. Aronson was not, and you will admit that there is some conflict in the testimony—isn't that true?

Mr. Haas: That is correct. [6]

The Court: I think you had better send me a memorandum; make it as informal as you want.

Fifteen days for the Trustee, and ten for the Respondent.

[Endorsed]: Filed December 4, 1958, [7] Reference.

TRUSTEE'S EXHIBIT No. 1

Book 1816, Page 355 and Page 356.

Mortgage of Chattels

This Mortgage made the thirty-first day of August, one thousand nine hundred and fifty-seven, by Wallace Dawson Loe, John O. Currence, W. D. Hutchison and Jack B. Montgomery, by occupation Salesmen-Mechanics, mortgagors, to B. H. Tanner, by occupation General Contractor, mortgagee.

Witnesseth: That the mortgagors mortgage to the mortgagee all that certain personal property situated and described as follows, to wit:

Qty.	Description	Serial or Model No.
1	Aerifier—"Spiker"	4054
1	Concrete Finish. Mchn. Whitman	625665
1	Cement Finisher Mall Power Trowel TG-36..	886644
1	Cement Mixer 3½ Sack Jaeger	83221
1	Concrete Mixer—¼ Sack Allen	1178909E
2	Cement Mixers—Gibson @ \$112	24T-PRM
1	Grinder-Mall	466223
Demolition/Drilling Equipment:		
1	Earth Drill w/9" auger	549-36242
1	12" Auger for earth drill	
1	Drilling Tool-Demo Elec. Hammer	S-541 (Ext.)
1	Hammer Milw. (#290 elec.)	38-4285

Qty.	Description	Serial or Model No.
1	Schramm B-80 Paving Breaker	47E0092
1	Schramm Clay Digger-Spade	48J-0308
1	Backfiller-Tamper BT-32	32-2322
1	Syntron Paving Breaker & Access.	H56PB374191
1	Concut Concrete Saw Mchn.—2 bids	2664395
1	Schramm B-60 Paving Breaker	60-2552
1	Vibrator-Mall (Elec.)	EV-2514
1	Vibrator-Mall 7' Ext.	929819

Elec. Extension Cords & Fittings

Engineering Equipment:

1	Leveler-McCord	
1	Dumpy Level	1046-1F

Generators/Compressors:

1	Delco 3 KW (elec.) Gen. Wise. Motor	1923248
1	Schramm 105 Compressor	110542

150' Air Hose Couplings:

1	C.P. 1/3 HP Compr.	Mod. C.P.
1	DeVilbiss Air Compressor	120673

Heater:

1	Chinook A-100 Wind Heater	M-4516
---	---------------------------------	--------

Mowers (lawn type):

1	Cooper Klipper 20" reel	751853
4	17" Eclipse Rotary Mowers	236142
1	Lark Eclipse	

Paint Equipment:

1	Decora Spray Paint Outfit (gas) w/air compressor	3BGK 11½ HP
1	Binks spray gun & access.	

Polishers, Sanders, Edgers, Buffers (Floor Type):

1	Clarke LV8-8" Sander	905233
1	Clarke LV5-5" Edger	11396
15	Clarke FM-12 Maintainers	
1	7" Buffer	34100
1	Cycle Polisher	

Qty.	Description	Serial or Model No.
Pumps:		
1	Jaeger Dewater (Wisc. Eng.)	39805
1	Fairbanks Morse 51½ Dewater	65673
Routers:		
1	Elec. Portable P-C	5040
1	Mall Elec. Hand	52850
Rug Cleaner:		
1	Rug Scrubber, Vacuum Attach.	4250
Sanders (Elec. Hand Type):		
1	Mall #31 Belt Sander	72380
1	Mall #25 Orbit Sander	
1	Porter Cable Orbit Sander	
Saws:		
1	McCulloch Chain 30"—2 man	1225-A
1	Milw. Sawzall	414
1	Clinton Chain Saw	49804
1	McCulloch 47 Auger	34272
2	Mall "72" Portable @ \$52.50.....	L8410-L8254
1	Mall Chain (Elec.)	931657
1	Skil Chain (Elec.)	606
1	Mall "54" Portable	G80351
Scaffold & Plasterboard Positioner:		
1	Scaffold—Self Propelled	
1	Panel Positioner-Erector	
Seythes:		
1	Jari Sr. 36" Power Seythe	36642
1	Jari Jr. 28" Power Seythe	63257
Skil Tools:		
Drills, Hammer, Grinder (Asst'd)		
Snap Tie Wedges:		
1360 Snap Tie Wedges		
Stakes:		
750 Asst'd stakes (30", 36", 40")		

[Title of District Court and Cause.)

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the Attorneys for the Appellant.

Receiver's petition for leave to sell personal property free and clear of liens. Order to show cause. Order denying receiver's petition for leave to sell personal property free and clear of liens. Petition for review. Referee's certificate on petition for review. Order affirming ruling of the Referee. Notice of appeal. Designation of contents of record. One volume reporter's transcript Aug. 15-22, 1958.

In Witness Whereof, I have hereunto affixed the seal of the above-entitled Court this 14th day of April, 1959.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ J. P. WELSH,
Deputy Clerk.

[Endorsed]: No. 16442. United States Court of Appeals for the Ninth Circuit. O. W. Irwin, Trustee of the Estate of General Equipment Co., a co-partnership composed of Wallace D. Loe and John O. Currence and Wallace D. Loe and John O. Currence, individually, bankrupts, Appellants, vs. S. H. Tanner, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 14, 1959.

Docketed: April 24, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16442

O. W. IRWIN, Trustee of the Estate of General
Equipment Co., a Co-partnership Composed of
Wallace D. Loe and John O. Currence, Bank-
rupt,

Appellant,

vs.

B. H. TANNER,

Appellee.

APPELLANT'S CONCISE STATEMENT OF
POINTS URGED ON APPEAL

Comes now O. W. Irwin, Trustee, Appellant herein, in accordance with Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, and specifies the following as a concise statement of the points on which he intends to rely upon this appeal from the Order made and entered by Honorable Lloyd H. Burke, Judge of the United States District Court for the Northern District of California on the 10th day of March, 1959, more particularly specified and described in the Notice of Appeal heretofore filed with the Clerk of said District Court on the 31st day of March, 1959, as follows:

1. That said Order was not supported by the evidence and is contrary to the law in that:

a. The finding of fact contained in the Referee's Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens dated November 3, 1958, and numbered 2 (and which was, by said Order of said District Judge, approved and confirmed), is contrary to the competent evidence adduced upon the trial of the issues joined between Appellant and Appellee by said Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens.

b. The aforesaid finding of fact is not supported by the competent evidence adduced upon the trial of the aforesaid issues more particularly referred to in said Referee's Order.

c. The conclusion of law made by said Referee in Bankruptcy and numbered 2 thereof is contrary to law in that it is not supported by competent evidence adduced upon the trial of said issues more particularly referred to in said Referee's Order.

d. That it affirmatively appears from all of the evidence adduced upon the trial of said issues that the chattel mortgage was not acknowledged according to law.

e. That it affirmatively appears from all of the evidence adduced upon the trial of said issues and from said Referee's Order, that said Referee in Bankruptcy based his Order solely upon the testimony of the Notary Public as to the acknowledgment of said chattel mortgage, and which testimony

was admitted over the proper objection of Appellant, as such Receiver.

Dated May 4, 1959.

SHAPRO & ROTHCHILD
AND JAMES M. CONNERS,

By /s/ DANIEL ARONSON, JR.,
Attorneys for Appellant.

[Endorsed]: Filed May 5, 1959, U.S.C.A.

No. 16,442

IN THE

United States Court of Appeals
For the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of
GENERAL EQUIPMENT Co., a copart-
nership composed of Wallace D. Loe
and John O. Currence, Bankrupt,

Appellant,

VS.

B. H. TANNER,

Appellee.

APPELLANT'S OPENING BRIEF.

SHAPRO & ROTHSCHILD,

JAMES M. CONNERS,

ARTHUR P. SHAPRO,

1450 Chapin Avenue, Burlingame, California,

Attorneys for Appellant.

DANIEL ARONSON, JR.,

1450 Chapin Avenue, Burlingame, California,

Of Counsel.

FILED

NOV 30 1959

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of jurisdiction	1
Statement of questions presented	2
Specifications of error	2
Statement of facts	4
Argument	7
I. The chattel mortgage is void as to creditors by the failure to properly acknowledge same	7
II. The testimony of the notary public was improperly admitted over appellant's objection	12
Conclusion	14

Table of Authorities Cited

Cases	Pages
Bell v. Sage, 60 Cal. App. 149, 212 Pac. 404 (1922)	11
Burek v. Buchen, 46 Cal. App. 2d 741, 116 Pac. 2d 958	10
Hopper v. Keys, 152 Cal. 493, 92 Pac. 1017	10
Kahriman v. Jones, 203 Cal. 254, 263 Pac. 537	10
Noyes v. Bank of Italy, 206 Cal. 266, 274 Pac. 68	10
Rolando v. Everett, 72 Cal. App. 2d 629, 165 Pac. 2d 33 ...	9, 10
Weatherbee v. Sinn, 76 Cal. App. 98, 238 Pac. 134	11
Williston v. Yuba City, 1 Cal. App. 2d 166, 36 Pac. 2d 445	11

TABLE OF AUTHORITIES CITED

Codes

Civil Code:	Page
Section 1188	9
Section 1189	9
Section 1199	9
Sections 1202, 1203	8
Section 2952	8
Section 2957	9
Government Code:	
Sections 27282 to 27286	8
Section 27287	8
11 U.S.C.A. 47	2
11 U.S.C.A. 48	2
11 U.S.C.A. 67c	2

Texts

27 Cal. Jur., Witnesses, Section 148, page 174	13
1 Cal. Jur. 2d, Acknowledgments, Section 5, page 463	10
3 Jones on Evidence, Civil Cases, 4th Ed., Section 853, page 1580	12

No. 16,442

IN THE

**United States Court of Appeals
For the Ninth Circuit**

O. W. IRWIN, Trustee of the Estate of
GENERAL EQUIPMENT Co., a copart-
nership composed of Wallace D. Loe
and John O. Currence, Bankrupt,

Appellant,

VS.

B. H. TANNER,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The Referee in Bankruptcy on November 3, 1958, made and entered his Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens (T. R. p. 6), which Order was made in proceedings pending in the United States District Court for the Northern District of California, entitled "In the Matter of General Equipment Co., a copartnership composed of Wallace D. Loe and John O. Currence, Bankrupt", and numbered 51656 in the records and files of said Court.

Appellant's petition to have the Order reviewed by the District Court was filed on November 7, 1958 (T. R. p. 9). The Petition was timely (11 U. S. C. A., 67c). The District Court had jurisdiction to review the Order (11 U. S. C. A., 67c). In an Order made and entered on March 10, 1959, the District Court affirmed the Order of the Referee (T. R. p. 18). Notice of appeal therefrom to this Court was filed March 31, 1959 (T. R. p. 18). The appeal was timely (11 U. S. C. A., 48). The jurisdiction of the Court to review the Order of the District Court is sustained by 11 U. S. C. A., 47.

STATEMENT OF QUESTIONS PRESENTED.

The questions before the Court are:

1. Was the chattel mortgage, which is the basis of Appellee's secured claim, properly acknowledged as required by the laws of the State of California?

2. Was the testimony of the notary public improperly admitted over Appellant's objection?

SPECIFICATIONS OF ERROR.

The Appellant's Concise Statement of Points Urged on Appeal filed herein (T. R. p. 51) gives in detail the points relied upon by Appellant. They are as follows:

1. That said Order was not supported by the evidence and is contrary to the law in that:

a. The finding of fact contained in the Referee's Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens dated November 3, 1958, and numbered 2 (and which was, by said Order of said District Judge, approved and confirmed), is contrary to the competent evidence adduced upon the trial of the issues joined between Appellant and Appellee by said Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens.

b. The aforesaid finding of fact is not supported by the competent evidence adduced upon the trial of the aforesaid issues more particularly referred to in said Referee's Order.

c. The conclusion of law made by said Referee in Bankruptcy and numbered 2 thereof is contrary to law in that it is not supported by competent evidence adduced upon the trial of said issues more particularly referred to in said Referee's Order.

d. That it affirmatively appears from all of the evidence adduced upon the trial of said issues that the chattel mortgage was not acknowledged according to law.

e. That it affirmatively appears from all of the evidence adduced upon the trial of said issues and from said Referee's Order, that said Referee in Bankruptcy based his Order solely upon the testimony of the Notary Public as to the acknowledgment of said chattel mortgage, and which testimony was admitted over the proper objection of Appellant.

STATEMENT OF FACTS.

On June 25, 1958, a voluntary petition in bankruptcy was filed by General Equipment Co., a co-partnership composed of Wallace D. Loe and John O. Currence, and Wallace D. Loe and John O. Currence, individually, in the Southern Division of the United States District Court for the Northern District of California, and thereafter and on the same day it was duly adjudged a bankrupt by said Court. On August 1, 1958, O. W. Irwin, Appellant herein, the duly qualified and acting Receiver of the estate of said bankrupt, filed with the said District Court, his Petition for Leave to Sell Personal Property Free and Clear of Liens (T. R. pp. 3-4) and on the same date the Referee in Bankruptcy issued an Order to Show Cause thereon (T. R. pp. 4-5). Thereafter, after hearings held on said Petition and Order to Show Cause on August 15 and August 22, 1958, the Referee made and entered (on November 3, 1958) his Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens (T. R. pp. 6-8) and thereafter Appellant timely filed with the Referee his Petition for Review of said Order (T. R. pp. 9-11), and thereafter a hearing was held on said Petition for Review before Honorable Lloyd H. Burke, Judge of said United States District Court, and thereafter and on March 10, 1959, Judge Burke made and entered his Order (T. R. pp. 18-19) here appealed from. Notice of Appeal was filed with said District Court on March 31, 1959 (T. R. pp. 19-20).

In August, 1957, Appellee, B. H. Tanner, entered into an agreement to sell the business known as General Equipment Co., to a partnership which was the predecessor of this bankrupt, and which Agreement was reduced to writing and is dated the 27th day of August, 1957. Thereafter said business was sold by Tanner to the bankrupt and a *chattel mortgage dated the 31st day of August, 1957*, was given by the bankrupt to Tanner covering the personal property which is the subject of this litigation, and which mortgage is Trustee's Exhibit No. 1 in evidence (T.R. pp. 42-48). The \$5,000.00 payment called for in the chattel mortgage was delivered to Tanner by check on the 13th day of September, 1957, and said chattel mortgage was thereafter and on September 16, 1957, recorded by said Appellee. The witnesses for Appellee, Hutchison (T. R. pp. 27-28) and Montgomery (T. R. pp. 26-27) who were members of the partnership who bought the business and executed the chattel mortgage, testified that the mortgage was signed by all four partners at the bankrupt's place of business and Appellee Tanner, also so testified (T. R. p. 33); and said Appellee's witnesses further testified that Tanner then took the mortgage to the office of his attorneys, where Saul M. Weingarten then placed upon said mortgage his notarial acknowledgment and delivered to Tanner the \$5,000.00 check.

The notary, Weingarten, testified that although the mortgage and the acknowledgment bear the date 31st day of August, 1957, he executed his notarial acknowledgment on September 13, 1957, when said mortgage

was brought to his office by Appellee, Tanner, and he further testified that the mortgagors acknowledged their signatures at that time (T. R. pp. 37-39).

The testimony of the Notary Public was admitted over the objection of Appellant Trustee (T. R. pp. 37-38) on the ground that the testimony of said witness would tend to impeach the other witnesses previously called by Appellee.

“(Testimony of Saul M. Weingarten.) . . .

.

A. It is. The document could not be completed on the 31st day of August; the reason it couldn't be completed is that the parties at that time agreed—

Mr. Aronson: I am going to object to any testimony that the [2] document could not be completed—any testimony that bears on that, your Honor. The document speaks for itself; it was made and executed on the 31st day of August, and *any testimony given by Mr. Weingarten would be by way of impeachment of any witnesses called.*

The Court: Well, Mr. Aronson, I would prefer that counsel for the respondent ask the question, and then if the question is objectionable you make the objection.

Q. (By Mr. Haas): The document was not signed on the date it bears?

A. No, it was not.

Q. Can you explain why?

Mr. Aronson: *I am going to object to this question and others along this line for the reason stated, and I ask that it be stricken.*

The Court: *Objection overruled.*” (Italics ours.)

ARGUMENT.

I. THE CHATTEL MORTGAGE IS VOID AS TO CREDITORS BY THE FAILURE TO PROPERLY ACKNOWLEDGE SAME.

It was the testimony of the witnesses for the Appellee Tanner, that the chattel mortgage here in question was signed by the four partners, Jack Montgomery, W. D. Hutchison, Wallace D. Loe and John O. Currence, at the bankrupt's place of business, and that it was thereafter taken by Appellee Tanner to the office of the notary where he (the notary) then affixed his seal. The pertinent testimony on direct examination of Jack Montgomery on this question is as follows:

"... and the chattel mortgage was signed in the place of business ...

Q. How did the chattel mortgage get to the place of business; do you recall who brought it there?

A. I believe Mr. Tanner brought it down at that time.

Q. Who signed it there, do you recall?

A. All four of us signed it there." T. R. p. 26.)

and then on cross-examination as follows:

"Q. Was Mr. Weingarten at the place of business?

A. Not to my knowledge." (T. R. p. 27.)

The witness Hutchison testified on direct examination that:

"Q. This document that was brought down; where was it brought?

A. To the office of General Equipment." (T. R. pp. 27-28.)

.

“Q. What happened to the chattel mortgage then?

A. It was sent back to Weingarten’s office, I believe.

Q. Do you know who took it to Weingarten’s office?

A. I think possibly I did, or Mr. Tanner.”
T. R. p. 28.)

Appellee Tanner when called by his attorney to testify, was not asked on direct examination as to the place that the mortgage was signed or who was present at this time of signing, but on cross-examination Mr. Tanner testified as follows:

“Q. As I understand Mr. Tanner, when you took this mortgage in it had been signed by the four partners at their place of business?

A. Yes.

Q. Mr. Weingarten was not present when they signed it?

A. No.” (T. R. p. 33.)

From the testimony above set forth, it is clear that the signatures of the mortgagors were placed on the document at the place of business, and that they did not appear before the notary public for the purpose of having their signatures acknowledged, and thus the acknowledgment is defective and not entitled to be recorded (Government Code Section 27287)¹ and

¹Government Code Section 27287: Unless it belongs to the class provided for in either Sections 27282 to 27286, inclusive, or Sections 1202 or 1203, of the Civil Code, or is a fictitious mortgage or deed of trust as provided in Section 2952 of the Civil Code, *before an instrument can be recorded its execution shall be acknowledged by the person executing it, or if executed by a corporation, by its*

the Appellate Courts of the State of California have held that such a chattel mortgage is invalid as to creditors, *Rolando v. Everett*, 72 Cal. App. 2d 629, 165 Pac. 2d 33.

Section 1188 of the California Civil Code provides:

“An officer taking the acknowledgment of an instrument must endorse thereon or attach thereto a certificate substantially in the forms hereinafter prescribed.”

and Section 1189 sets forth, *inter alia*, the general form of acknowledgment as follows:

“The certificate of acknowledgement, unless it is otherwise in this article provided, must be substantially in the following form:

“State of }
County of } ss.

“On this day of in the year before me (here insert name and quality of the officer), *personally appeared*, known to me (or proved to me on the oath of) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or she or they) executed the same.” (Italics ours.)

California Civil Code, Section 2957 provides, *inter alia*:

“A mortgage of personal property or crops is void as against creditors of the mortgagor and

president or secretary or other person executing it on behalf of the corporation, or proved by a subscribing witness or as provided in Sections 1198 and 1199 of the Civil Code, and the acknowledgment or proof certified as prescribed by law (italics ours).

subsequent purchasers and encumbrances of the property in good faith and for value, unless: 1. it is acknowledged, or proved and certified in like manner as grants of real property.”

The term “creditors of the mortgagor” as to whom a defectively acknowledged mortgage is void includes those existing prior to the execution of the mortgage as well as those whose claims are subsequent. *Noyes v. Bank of Italy*, 206 Cal. 266, 274 Pac. 68. In *Rolando v. Everett*, supra, the Court held that a chattel mortgage which was improperly acknowledged was invalid as to creditors, notwithstanding that the mortgage had been recorded, holding that it did not constitute notice to creditors. On this point see also 1 *Cal. Jur.* 2d, Acknowledgments, Section 5, Page 463, and the cases therein cited.

In *Hopper v. Keys*, 152 Cal. 493, 92 Pac. 1017, the Court held that since the authority for the creation of chattel mortgages derives its force from statutory provisions that the rights accruing under such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions, which view was affirmed by *Kahriman v. Jones*, 203 Cal. 254, 263 Pac. 537. In *Burck v. Buchen*, 46 Cal. App. 2d 741, 116 Pac. 2d 958 at 961, the Court held that when taking an acknowledgment “the officer should require the acknowledging party to appear in person before him, as he is required to certify that such party ‘personally appeared’. . . .” That an acknowledgment taken by an officer out of the presence of the grantors is irregu-

lar, see *Williston v. Yuba City*, 1 Cal. App. 2d 166, 36 Pac. 2d 445.

As a general rule, it is possible to show that portions of an acknowledgment are in error, the usual case being where one attempts to show that his purported signature is a forgery. Here the Court will note that the chattel mortgage, which is Trustee's Exhibit No. 1 (T.R. p. 42) was dated, and the acknowledgment also, bears the date of August 31, 1957, but that it was the testimony that it was not actually signed until September 13, 1957.

In *Bell v. Sage*, 60 Cal. App. 149, 212 Pac. 404 (1922), there were two chattel mortgagors, but only one of them acknowledged the execution. The mortgage was recorded, but the District Court of Appeal held the recordation to be of no effect because of only one acknowledgment

“When the terms of the statute are complied with the record becomes conclusive notice, often contrary to the fact. When a mortgagee claims the benefit of such conclusive presumption which the law creates in his behalf, it is not unreasonable to hold him to a substantial compliance with the law which he invokes.” 60 Cal. App. 149, 153.

Cited with approval in *Weatherbee v. Sinn*, 76 Cal. App. 98, 238 Pac. 134, 136.

From the foregoing testimony of Appellee and his own witnesses, it appears that the Referee was completely correct in finding in his Order (T. R. pp. 7-8) that without the testimony of the notary public the mortgage would be invalid as against the Trustee

by reason of the failure to have a proper and legal acknowledgment of the document.

II. THE TESTIMONY OF THE NOTARY PUBLIC WAS IMPROPERLY ADMITTED OVER APPELLANT'S OBJECTION.

The testimony of Appellee Tanner and his witnesses, Montgomery and Hutchison, *supra*, clearly shows that the chattel mortgage was signed at the place of business and was thereafter taken by Tanner to the office of the notary, and that the mortgagors were not present at the time that the notary signed the chattel mortgage and affixed his seal. At the subsequent hearing on August 22, 1958, when the notary public was called as a witness for Appellee, Appellant objected to the taking of certain testimony from the notary on the ground that it would serve only to impeach the witnesses previously called by Appellee (T. R. p. 37). This objection was overruled (T. R. p. 38).

The general rule as to the impeachment of a party's own witness is as stated in 3 *Jones on Evidence*, Civil Cases, 4th Ed., Sec. 853, page 1580, as follows:

“According to the established rule of the common law, a party may not give general evidence that his own witness is unworthy of belief. This conclusion is based on the theory that a person who produces a witness vouches for him as being worthy of credit, and that a direct attack upon the veracity of the witness ‘would enable the party to destroy the witness, if he spoke against him, and to make him a good witness, if he spoke

for him, with the means in his hands of destroying his credit, if he spoke against him'."

See 27 *Cal. Jur.* Witnesses, Sec. 148, page 174, and the cases therein cited, wherein it is stated:

"In addition to the requirement that a witness give material testimony, in order that a party producing a witness may impeach him by proof of inconsistent statements, *it must appear that such party has been misled and taken by surprise.* Furthermore, such surprise must be substantial, and founded upon an honest belief that the witness' testimony would be different from that given. Clearly, a party may not be said to be surprised by the testimony of a witness which accords with a deposition previously taken; a party may not impeach his witness by evidence of his declarations contrary to a stipulation as to the testimony of such witness; *nor is it permissible to call a witness solely for the purpose of impeaching him.*" (Italics ours.)

Here it is quite plain that counsel for the Appellee was neither misled nor taken by surprise so he could not qualify for the exception to the rule on impeaching one's own witness and the testimony of the Notary Public must obviously be only for the purpose of impeaching the prior witnesses.

We here call to the Court's attention the fact that the Referee based his decision solely upon the testimony of the Notary Public and that if Appellant's objection to the testimony of the Notary Public was properly made and should have been sustained that he would have found to the contrary, and we specifi-

cally refer the Court to Conclusion No. 2 of said Referee's Order, which states as follows:

“Wherefrom the Court Concludes: . . .

“2. That solely by reason of the testimony of Saul M. Weingarten, Notary Public, as to the acknowledgment of said chattel mortgage, said chattel mortgage was properly executed, acknowledged and recorded and is a valid and existing lien upon the personal property as against the estates of the above-named bankrupts (it is here noted that the testimony of said Notary Public on the subject of the alleged acknowledgment of said chattel mortgage was admitted by the Court over the objection thereto of counsel for said Receiver, which objection was made upon the grounds that said testimony would be incompetent, irrelevant and immaterial and that the questions which elicited such testimony from said Notary Public tended to impeach the testimony theretofore adduced by Respondent and accepted by the Court as to the lack of acknowledgment of said chattel mortgage by the mortgagors therein named), and good cause appearing therefor, . . .” (T. R. pp. 7-8).

CONCLUSION.

In view of the facts and law hereinabove set forth, it is Appellant's contention that the chattel mortgage here in question was not acknowledged as required by the laws of the State of California, and thus not entitled to recordation and thus void against Appellant herein. The testimony of the Notary Public upon which the Referee's Order was based was improperly

admitted over objection, and that the Order of the District Judge here complained of should be, by this Court reversed and remanded with instructions to the District Court to make and enter an Order in said bankruptcy proceedings that said mortgage was and is invalid as against Appellant, and that Appellant be authorized to sell the personal property covered by said chattel mortgage, free and clear of the lien thereof.

Dated, July 20, 1959.

Respectfully submitted,
SHAPRO & ROTHSCHILD,
JAMES M. CONNERS,
By ARTHUR P. SHAPRO,
Attorneys for Appellant.

DANIEL ARONSON, JR.,
Of Counsel.

(Appendix A Follows.)

Appendix "A"



Appendix A

TABLE OF EXHIBITS

Rule 18 2(f)

Trustee's Exhibit No. 1 Chattel Mortgage dated
August 31, 1957 (set forth in haec verba
Transcript pages 42-48) Transcript p. 34

No. 16,442

United States Court of Appeals
For the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of
GENERAL EQUIPMENT Co., a copart-
nership composed of Wallace D. Loe
and John O. Currence, Bankrupt,

Appellant,

VS.

B. H. TANNER,

Appellee.

BRIEF FOR APPELLEE.

TWOHIG, WEINGARTEN & HAAS,

MYRON B. HAAS,

Seaside Professional Building, Seaside, California,

Attorneys for Appellee.

FILED

AUG 27 1959

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Argument	1
Conclusion	4

Table of Authorities Cited

Cases

	Page
In re Mercury Engineering, 68 Fed. Supp. 376	4

Texts

1 Cal. Jur. 2d, Acknowledgments:	
Section 16, p. 488	3
Section 47, pp. 530-531	3
Section 29, p. 503, Paragraph 2	2
Witkin, "California Evidence," p. 436, Section 388 (a)	3

No. 16,442

United States Court of Appeals For the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of
GENERAL EQUIPMENT Co., a copart-
nership composed of Wallace D. Loe
and John O. Currence, Bankrupt,

Appellant,

VS.

B. H. TANNER,

Appellee.

BRIEF FOR APPELLEE.

ARGUMENT.

Taking Appellant's contentions in reverse order, Appellee submits that the testimony of the Notary Public was properly admitted and that his testimony shows the chattel mortgage was properly acknowledged.

The statement in Appellant's Opening Brief (p. 12) that:

“The testimony of Appellee Tanner and his witnesses, Montgomery and Hutchison, *supra*, clearly shows that the chattel mortgage was signed at the place of business and was thereafter taken by Tanner to the office of the notary, and that the

mortgagors were not present at the time that the notary signed the chattel mortgage and affixed his seal”

is in part misleading.

These witnesses testified only to the signing of the chattel mortgage. They gave no testimony concerning acknowledgment, signature by the Notary Public or sealing of the document by the Notary.

Parenthetically, it may be noted that the certificate of acknowledgment need not immediately follow the acknowledgment.

1 *Cal. Jur.* 2d Acknowledgments, Section 29, p. 503, Paragraph 2.

The testimony of the Notary Public did not impeach, but did, in fact, corroborate and supplement the testimony of Appellee's previous witnesses.

The Notary Public testified that the chattel mortgage in question was not executed on August 31, 1957, the date it bears, but was to the best of his knowledge executed on September 13, 1957, and was, in fact, acknowledged before him on that date in his office. He explained why the chattel mortgage was not signed on August 31, 1957. (T.R., pp. 37-39.)

A comparison of the testimony of the Notary Public with that of Appellee's witnesses fails to show any impeachment.

The witnesses testifying for Appellee, in the order of their testimony, were Jack Montgomery, W. D. Hutchison and the Appellee, B. H. Tanner.

Jack Montgomery testified that the chattel mortgage was signed ten or twelve days after September 1, 1957, in the place of business and explained the reasons for the delay in signing the chattel mortgage after he and his partners had taken possession of the business. (T.R., p. 26.)

W. D. Hutchison testified that the chattel mortgage was not signed until approximately 12 to 14 days after September 1, 1957. (T.R., pp. 27-28.)

B. H. Tanner testified that the chattel mortgage was not signed until the 12th or 13th of September, 1957, and explained why it was not signed until that time. (T.R., p. 29.)

None of these three witnesses gave any testimony concerning acknowledgment of the chattel mortgage.

A review of the transcript makes it clear that the testimony of the Notary Public corroborated the testimony of the previous three witnesses for Appellee as to the date of the execution of the chattel mortgage and the reason it was not executed until September 13, 1957.

The testimony of the Notary Public as to acknowledgment was not contrary to any testimony of the previous three witnesses as none of them gave any testimony concerning the acknowledgment.

The Notary Public was a competent witness to so testify.

1 *Cal. Jur.* 2d, Acknowledgments, Section 16, p. 488; Section 47, pp. 530-531;

Within, "California Evidence," p. 436, Section 388 (a).

The fact that the chattel mortgage was a purchase price chattel mortgage should not be forgotten. It is submitted that the guide to the proper ruling herein was expressed by Judge Yankwich to the effect that California law favors the vendor by recognizing a lien for his unpaid purchase price,

“So a ruling which protects against creditors a chattel mortgage given to secure the purchase price of the personal property is in harmony with this generous attitude of the law.”

In re Mercury Engineering, 68 Fed. Supp. 376, 379.

CONCLUSION.

Appellee contends the testimony of the Notary Public was proper and accordingly shows the chattel mortgage was properly acknowledged. The order of the District Judge should be affirmed.

Dated, Seaside, California,
August 24, 1959.

Respectfully submitted,

TWOHIG, WEINGARTEN & HAAS,
By MYRON B. HAAS,
Attorneys for Appellee.

No. 16,442

IN THE

United States Court of Appeals
For the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of
GENERAL EQUIPMENT Co., a copart-
nership composed of Wallace D. Loe
and John O. Currence, Bankrupt,

Appellant,

VS.

B. H. TANNER,

Appellee.

APPELLANT'S CLOSING BRIEF.

SHAPRO & ROTHSCHILD,

JAMES M. CONNERS,

ARTHUR P. SHAPRO,

1450 Chapin Avenue, Burlingame, California,

Attorneys for Appellant.

DANIEL ARONSON, JR.,

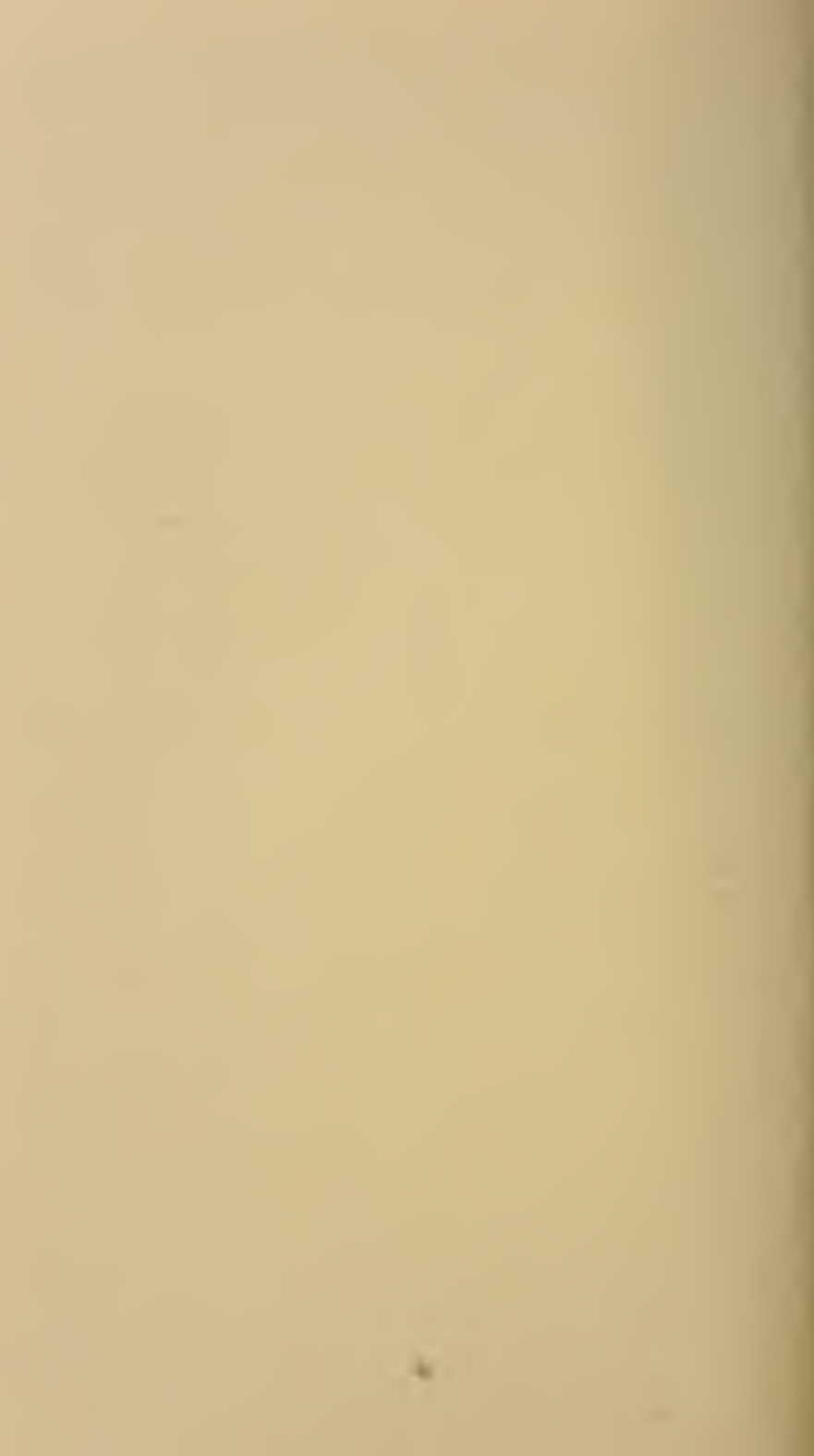
1450 Chapin Avenue, Burlingame, California,

Of Counsel.

FILE

SEP 16 1959

PAUL P. O'BRIEN, C



Subject Index

	Page
Summary of appellant's position	1
Comment upon appellee's points	2
Conclusion	5

Table of Authorities Cited

Cases	Page
Jemison v. Howell, 161 So. 806, 230 Ala. 423, 99 A.L.R. 1511	3
Pardo v. Creamer, 310 S.W. 2d 218	3
Trowbridge v. Bisson, 44 N.W. 2d 810, 153 Neb. 389	3
Wilde v. Buchanan, 303 S.W. 2d 518	3

Codes	
Civil Code, Sections 1188, 1189 and 2957	3
Government Code, Section 27287	3

No. 16,442

IN THE

**United States Court of Appeals
For the Ninth Circuit**

O. W. IRWIN, Trustee of the Estate of
GENERAL EQUIPMENT Co., a copart-
nership composed of Wallace D. Loe
and John O. Currence, Bankrupt,

Appellant,

VS.

B. H. TANNER,

Appellee.

APPELLANT'S CLOSING BRIEF.

SUMMARY OF APPELLANT'S POSITION.

Appellant's position will be more fully stated hereafter in connection with his reply to specific points advanced by Appellee.

It is Appellant's major premise that the chattel mortgage, which is the basis of Appellee's secured claim, was not properly acknowledged as required by the laws of the State of California, which premise is supported by the testimony and by Conclusion number 2 of the Referee's Order (T. R. pp. 7-8) cited by Appellant in his Opening Brief on page 14.

The next premise is that the testimony of the notary public was improperly admitted over Appellant's objection and that had his objection been properly sustained by the Referee, then the Referee would have ruled in favor of Appellant (see Conclusion number 2 of said Referee, *supra*), wherein the Referee concluded that the chattel mortgage was properly executed, acknowledged and recorded and thus a valid and existing lien on the personal property *solely by reason of the testimony of the notary public*.

COMMENT UPON APPELLEE'S POINTS.

On page 2 of Appellee's Brief, he states that the witnesses Tanner, Montgomery & Hutchison testified only to the signing of the mortgage and gave no testimony concerning the acknowledgment. We submit that Appellee is engaging in the most technical form of semantics since the testimony of these three witnesses, the pertinent portions of which are set forth in Appellant's Opening Brief, pages 7 and 8, was that the mortgage was signed at the place of business and that Tanner (mortgagee) then took the document to the notary. This is contrary to the notary's testimony that it was "acknowledged" by the mortgagors to him. The three witnesses, other than the notary, testified, in effect, that the mortgagors did not appear before the notary or at any time acknowledge their signatures to the notary. Mr. Weingarten's testimony that he "took the acknowledgment on that date" (T. R.

p. 38) and “after taking the acknowledgment” (T. R. p. 39) is merely his conclusion at best.

The requirements of acknowledgment under the laws of the State of California are as set forth in Government Code Section 27287, Civil Code Sections 1188 and 1189, and 2957 (cited in Appellant’s Opening Brief, pages 8, 9 and 10).

“Acknowledgment is formal admission, before an officer, by one who has executed an instrument, that the instrument is his act and deed.”

Jemison v. Howell, 161 So. 806, 230 Ala. 423, 99 A.L.R. 1511.

“An acknowledgment is an act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or Court and declares or acknowledges the same to be his genuine and voluntary act and deed.”

Trowbridge v. Bisson, 44 N.W. 2d 810, 812, 153 Neb. 389.

“An acknowledgment is a formal declaration or admission before authorized public officer by person who has executed instrument that such instrument is his act and deed.”

Wilde v. Buchanan, 303 S.W. 2d 518, 519;

Pardo v. Creamer, 310 S.W. 2d 218, 221.

Appellee on page 2, and again on page 3, of his Brief, states that the testimony of the notary public did not impeach, but in fact corroborated and supplemented, the testimony of his previous witnesses. This statement is contrary to the facts. See testimony of

Appellee's witnesses above referred to and Conclusion number 2 of the Referee's Order. Further, his testimony was contrary to the purpose for which the notary was called.

"Mr. Haas. I have four Affidavits; one of Mr. Weingarten——

Mr. Shapro. I object to any ex parte affidavits; if any evidence is to be offered I insist that it be here in the form of testimony, and if Mr. Haas desires a continuance for that purpose I will not agree to accept any ex parte affidavits.

The Court. With the objection on the part of the Trustee I have no alternative but to continue it; in other words, he is certainly entitled to an opportunity to examine the four witnesses or affiants; but as far as the Court is concerned it would be without prejudice to your clients' rights; you will be afforded whatever opportunity you desire to furnish any testimony. Anything further, gentlemen?

Mr. Shapro. Nothing further as far as the Trustee is concerned.

Mr. Haas. Nothing further.

The Court. Do you gentlemen desire that the matter be carried until you produce this witness?

Mr. Haas. I was going to produce him to substantiate the testimony of Montgomery and Hutchison. They have already testified; if you want Mr. Weingarten here——

Mr. Shapro. Do you want him here?

Mr. Haas. I don't think he can be here for some time, and frankly I don't think he can add anything further, other than the fact that he is an attorney and notary and would testify to the same effect." (T. R. pp. 34-35.)

On page 3 of Appellee's Brief reference is made to a delay in the execution of the mortgage and to avoid any possible confusion as to the issues, Appellant's position is that he does not challenge the validity of the mortgage on the basis of a delay in recordation but rather on the ground that it was not properly acknowledged.

“Mr. Shapro. At the opening you stated that your only objection to the mortgage was delay in recordation. On the basis of the testimony I desire to have it understood it is on the ground that the mortgage was not properly acknowledged as required by statute, anyway.” (T. R. p. 35.)

Appellant concedes that a notary public is a competent witness to testify in a proper case as to the date of execution, etc., but in this case, the notary public was called as a witness and the net result of his testimony, admitted over Appellant's objection, was to impeach the testimony of *Appellee's own witnesses* whose testimony was such that there was no acknowledgment as required by the laws of the State of California.

CONCLUSION.

In conclusion, it is respectfully submitted that the chattel mortgage here in question was not properly acknowledged as required by the laws of the State of California, and thus not entitled to recordation and thus void as against Appellant herein in that the testimony of the notary public (upon which the

Referee's Order was based) was improperly admitted over objection, and the Order of the District Judge here complained of should be, by this Court, reversed and remanded with instructions to the District Court to make and enter an Order in said bankruptcy proceedings that said mortgage was and is invalid as against Appellant and that Appellant be authorized to sell the personal property covered by said chattel mortgage free and clear of the lien thereof.

Dated, September 14, 1959.

SHAPRO & ROTHSCHILD,
JAMES M. CONNERS,
By ARTHUR P. SHAPRO,
Attorneys for Appellant.

DANIEL ARONSON, JR.,
Of Counsel.

